FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1217

VIRGINIA DARE TRANSPORTATION CO., INC.,
Petitioner and Appellee below

vs.

NORFOLK SOUTHERN BUS CORPORATION,
Respondent and Appellant below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

~~*Respondent and Appellant below*~~
W. R. ASHBURN,
Norfolk, Virginia;

J. C. B. EHRINGHAUS,
Raleigh, North Carolina;
Counsel for Petitioner

COMMERCIAL PTG. CO., RALEIGH

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CASES

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Appellee below, respectfully shows:

Statement of the Matter Involved

This is an action between two bus companies. It grows out of an arrangement memorialized by two writings, (1) Defendant's Exhibit 4 at first trial, (mistrial), Exhibit 8 at last trial, a copy of which, for convenience of reference, is attached to the Brief supporting this Petition, and (2) Defendant's Exhibit 2, pages 6-9 of Appellant's Brief in Circuit Court of Appeals and pages 210-215 of Appendix thereto. Except

where otherwise stated page references are to Appendix to Appellant's Brief.

Under the first of these, Virginia Dare gave up to Norfolk Southern its terminals in Elizabeth City and Norfolk, surrendered and released its right to the payment of Fourteen Thousand Dollars ($14,000.00) by Norfolk Southern for compliance with a previous contract and option and other rights thereunder (including a terminal at Sligo) and conveyed to Norfolk Southern the so-called Habit franchise between Norfolk, Elizabeth City and extending far beyond through Edenton, Plymouth, Washington, etc. Under the second of these writings, which is the subject of this action, Norfolk Southern agreed to furnish, in lieu of those rights and properties surrendered, etc., terminals, pick-up and delivery service to Virginia Dare at Norfolk and Elizabeth City without further charge for as many as two round trips a week and the agreement that Virginia Dare was to pay a stipulated amount for service for any additional trips, that is, trips in excess of two round trips a week. There is not one word in this contract limiting Virginia Dare to two or to any other number of trips or schedules.

These papers were all drawn by Norfolk Southern officials or attorneys (p. 42-43), were sent to Virginia Dare in the same envelope for signature and returned and were received and executed as a part of one and the same transaction. (P. 52 and 53) (Appendix to Appellant's Brief, page 42-53, inclusive). Furthermore as will appear by reference to said pages, they were signed and returned exactly as prepared and forwarded to Virginia Dare for signature and without slightest change in either of them. (Page 41)

Under this arrangement, of course, Norfolk Southern received immediately the consideration which passed to it under the two-writing arrangement; namely, the Habit franchise, the two terminals which Virginia Dare had been using up to that time, and release from its obligations under the previous

contract. Since at that time Norfolk Southern had no franchise between Norfolk and Elizabeth City, and since the extension of the Habit franchise beyond Edenton paralleled the Norfolk Southern Railroad this franchise was very valuable to Norfolk Southern. Norfolk Southern is still in possession and enjoyment of this franchise and all the other rights and privileges surrendered to it by Virginia Dare.

On the other hand, except for the cash consideration, which was paid to Virginia Dare in large part by Habit Brothers in settlement of the law suit then pending, and only about Sixteen Hundred Dollars ($1,600.00) of which was paid by Norfolk Southern, the principal value passing to Virginia Dare was the arrangement for terminal, pick-up and delivery services at Norfolk and Elizabeth City, which were largely prospective and covered a period of years ahead.

After the parties had acted under this arrangement for approximately four and one-half years without slightest question of its validity, Norfolk Southern suddenly raised question of the validity of the arrangement providing terminal. pick-up and delivery services to Virginia Dare. However, Norfolk Southern continued and still continues to enjoy the Habit franchise and the other rights and immunities which it received under the arrangement while challenging those which represent practically the only compensation, or certainly the bulk of the compensation, passing to Virginia Dare for its conveyances and surrenders under the arrangement represented by the two writings.

The Norfolk Southern instituted this action in the District Court of the United States for the Eastern District of Virginia, for recovery, as upon quantum meruit, of the value of the terminal, pick-up and delivery services furnished to Petitioner (Virginia Dare) at the terminals in Norfolk, Virginia, and Elizabeth City, North Carolina, over the period of approximately four and one half years, during

which they had been operating under these contracts. Virginia Dare denied the right of Norfolk Southern to recover, insisting that the services had been furnished under the written contract (Defendant's Exhibit 2, above referred to) which was made and executed between Norfolk Southern and Virginia Dare, a partnership, to whose rights and interest Virginia Dare, Incorporated had completely succeeded (Appendix to Appellant's Brief P. 55), and insisting further that said contract had been executed in connection with and in compensation for the rights, franchises and immunities conveyed and surrendered by Virginia Dare to Norfolk Southern under Defendant's Exhibit 4 above referred to.

In this action also, Virginia Dare counterclaimed for damages suffered by it in consequence of Norfolk Southern's repudiation and breach of this contract to furnish terminal, pick-up and delivery services for two trips a week for the remainder of the term and for the extension thereof provided in this contract.

In the hearing in the District Court, the Trial Judge peremptorily instructed the Jury against Norfolk Southern's right to recover on quantum meruit, upon the ground that the services had been rendered under the written contract with manifestly no requirement or expectation of additional compensation and no recovery on quantum meruit could therefore be sustained. Further, the Trial Judge submitted to the Jury the questions of breach and damage to Virginia Dare which were raised by its counterclaim and the Jury assessed these damages at Sixty Thousand Dollars ($60,000.00). Judgment was entered accordingly. Norfolk Southern appealed from this Judgment to the Circuit Court of Appeals, Fourth Circuit, and, among other things, assigned as error the refusal by the Trial Judge to receive in evidence certain letters (Appendix to Appellant's Brief, pages 93-102) and certain testimony (Appendix to Appellant's Brief, pages 139-146 and 147-156), which were offered by Norfolk Southern

and which Norfolk Southern contended tended to show (a) an intention of the parties that Virginia Dare was limited to operating only two days a week instead of six days a week as it had previously done, and that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business and the revenues to be divided at the end of the month on a one-third—two-thirds basis, and (b) that the written instrument (Defendant's Exhibit 2) did not contain the entire agreement between the parties, and particularly did not contain an illegal agreement of the character just mentioned.

This testimony was excluded by the Trial Judge because, among other reasons, (1) the language of Exhibit 2 was not ambiguous but perfectly clear in preserving to Virginia Dare the right to run additional schedules if and when it desired so to do, and conversely, placed no slightest limitation upon the number of schedules which Virginia Dare might run; (2) Defendant's Exhibit 2 contained also repeated provision against implication of any illegal obligation or requirement and against the indulgence of any construction contrary to law or public regulation and thus also emphatically negatived the possibility either of ambiguity or of illegal obligation arising through implication or otherwise, and (3) the testimony offered was of parol proof, which was in direct contradiction of the plain and clear terms of the writing, which proof is never admissable to contradict a writing.

The Circuit Court of Appeals ruled that this tendered testimony should have been admitted. Further, the Circuit Court of Appeals, instead of directing a new trial on the counterclaim with its opportunity to Virginia Dare to contradict or explain the tendered testimony and permitting the Jury to pass upon this conflict as in ordinary and accepted procedure, proceeded itself to accept the tendered testimony and more particularly the construction placed upon it by Norfolk South-

ern, as true, final and conclusive and upon the basis of this testimony proceeded to declare the contract as illegal, remanded the cause to the District Court with directions to enter final judgment against Virginia Dare on its counterclaim, leaving Norfolk Southern in enjoyment of all the property and rights which it acquired under the arrangement and nullifying only the conpensatory provisions for Virginia Dare.

This Petition is filed to obtain review of this ruling and of the procedure directed by the Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question and particularly the procedure directed by the Circuit Court of Appeals, because of the provision of 28 U. S. C. A. 347 (a) (Judicial Code, 240) and because said ruling and procedure directed by the Circuit Court of Appeals not only materially affected but definitely controlled the determination of said appeal and of said cause and constituted a final determination of disputed facts without the intervention of a Jury, upon which facts the validity of the contract was adjudicated.

Under usual and normal procedure at the most, a new trial would have been directed on which Virginia Dare would have been afforded opportunity to reply to this tendered testimony and the Jury left to determine, upon this basis and upon the basis of contradictory evidence already in the record (Appendix to Appellant's Brief, Page 106 especially), whether there was in fact an additional agreement of a character so illegal as to vitiate the entire contract. Instead of following this usual and normal procedure, the Circuit Court of Appeals, in its opinion delivered January 7, 1947, which appears in the record, accepted as a fact what the Norfolk Southern insisted that the proffered testimony tended to show; namely, that there was an additional agreement limiting Virginia Dare to two round trip schedules a week and

providing for the division of revenues between Norfolk Southern and Virginia Dare on a two-thirds—one-third basis. Virginia Dare was thus afforded no opportunity to reply to this tendered testimony since it was excluded by the Trial Judge in the District Court and further the suggestion that there was agreement to make two-thirds—one-third division of revenues is expressly negatived by the testimony of the witness Lennon on page 106 of Appendix to Appellant's Brief in the Circuit Court of Appeals, where it will be found that Lennon testified that the division was made on the basis of the shipper's designation of the transportation company which he desired to utilize. It is contended that the Supreme Court has jurisdiction to review such decision and procedure under and because of the provisions of the statute above cited.

For the above reasons, it is maintained that a substantial question is presented to this Court for decision. Decisions believed to sustain the reviewing jurisdiction here contended for are set forth in the supporting brief attached hereto.

QUESTIONS PRESENTED

The questions herein presented are:

(1) Was the trial Court in error in excluding said evidence?

(2) Was the Circuit Court of Appeals in error in thus departing from the accepted and usual course of judicial proceedings by accepting as final and determinative this tendered evidence and Norfolk Southern's interpretation thereof and, on the basis thereof, adjudicating the invalidity of the contract instead of directing a new trial as is usual, particularly in view of contradictory evidence already appearing in the record and Virginia Dare's demand for a jury trial?

(3) Was the contract invalid even upon this basis?

Reasons Relied on for the Allowance of the Writ

(1) The testimony offered and ruled competent by the Circuit Court of Appeals, both letters and oral evidence, tends not to clarify but to contradict. It does not explain what the contract says but (as interpreted by Norfolk Southern) negates the provisions thereof. This reason will be amplified in the supporting brief attached hereto.

(2) The decision of said Circuit Court of Appeals, by remanding the cause for final judgment on the counterclaim, instead of sending it back for a new trial, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In fact it deprives Petitioner of its right and demand for a Jury trial and substitutes therefor the finding by the Circuit Court of Appeals. This reason will be amplified in the supporting brief attached hereto.

(3) The decision of said Circuit Court of Appeals as to the validity of the Contract is a decision of a federal question in a way probably in conflict with applicable decisions of this Court. This reason will be amplified in the supporting brief attached hereto.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fourth Circuit had in the case numbered and entitled on its docket, No. 5527, Norfolk Southern Bus Corporation, Appellant, vs. Virginia Dare Transportation Company, Incorporated, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United

States Circuit Court of Appeals, Fourth Circuit, be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 4th day of April, 1947.

W. R. ASHBURN,
Norfolk, Virginia;
J. C. B. EHRINGHAUS,
Raleigh, North Carolina;
Counsel for Petitioners.

Exhibit No. 8

KNOW ALL MEN BY THESE PRESENTS, that

WHEREAS, on and as of September 12, 1936, Norfolk Southern Bus Corporation entered into a contract with R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, partners trading as the Virginia Dare Transportation Company, by which Virginia Dare Transportation Company agreed and contracted to sell and transfer unto the Norfolk Southern Bus Corporation certain franchises, certificates and rights to operate as a common carrier of commodities and property between Norfolk, Virginia and Elizabeth City, North Carolina, via Sligo, upon the terms and conditions in said contract set out, among others that the said contract between the parties and the right to transfer said certificates and rights of operation should be approved by the Interstate Commerce Commission and the State Corporation of Virginia and the Utilities Commission of North Carolina, all as set out in said contract; and,

WHEREAS, on and as of September 14, 1936, Norfolk Southern Bus Corporation made application to the Interstate Commerce Commission for authority to purchase and operate the certificates and rights of the Virginia Dare Transportation Company to operate between Norfolk, Virginia and Elizabeth City, North Carolina, upon the terms and conditions in said contract set out; and,

WHEREAS, on and as of August 3, 1938, the Interstate Commerce Commission entered an order on said application, which had been duly heard by the Interstate Commerce Commission, and was carried on its docket as No. BMC-F-111, which order is referred to and made part hereof; and,

WHEREAS, on and as of June 22, 1937, in Finance Docket No. MC-37015, a certificate of public convenience and necessity was issued to John Habit and Joe Habit, a partnership doing business as Habit Brothers Freight Line,

to operate as a common carrier by motor vehicles of commodities between Beaufort, North Carolina and Norfolk, Virginia, as set out in said certificate, No. MC-37015, which is referred to as a part hereof; and,

WHEREAS, by authority and under the approval of the Interstate Commerce Commission, the rights, privileges and franchises granted unto John Habit and Joe Habit, co-partners trading as the Habit Brothers Freight Line, has been assigned and is now held by the Virginia Carolina Transportation Company, a corporation of the State of North Carolina; and,

WHEREAS, on and as of August 1, 1938, John Habit and Joe Habit, as co-partners trading as the Habit Brothers Freight Line, granted unto the Virginia Dare Transportation Company, a co-partnership consisting of R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, the right and privilege during a period of ninety (90) days from said date to purchase and have transferred to it, subject to the approval of the Interstate Commerce Commission, the State Corporation Commission of Virginia, and the Utilities Commission of North Carolina, all of the rights and privileges the said Joe Habit and John Habit held under the said certificate No. MC-37015; and,

WHEREAS, the said John Habit and Joe Habit, trading as Habit Brothers Freight Line, after the expiration of the said ninety (90) days, claiming that the terms of the option had not been complied with, declined to transfer such certificate and the rights thereunder and therein set out unto the Virginia Dare Transportation Company, and thereafter transferred and conveyed said rights and privileges to the Virginia Carolina Transportation Company, a corporation created under the laws of the State of North Carolina, and thereafter the Virginia Dare Transportation Company, co-partnership as aforesaid, instituted a suit in the Superior

Court of Dare County, North Carolina against John Habit and Joe Habit, co-partners trading as Habit Brothers Freight Line, and the Virginia Carolina Transportation Company, claiming and demanding specific performance of the contract set out in said option of August 1, 1938, which said suit is now pending in the said Superior Court of Dare County; and,

WHEREAS, on or about the 25th day of November, 1939, Norfolk Southern Bus Corporation made application to the Interstate Commerce Commission for authority to acquire a part of the franchises and permits issued to John Habit and Joe Habit, a partnership doing business as Habit Brothers Freight Line, and to operate as a common carrier by motor vehicle of commodities over that part of the route set out in certificate No. MC-37015, as set out and described in the contract between H. C. Goodwin, Jr., and W. S. Privott, Jr., and Norfolk Southern Bus Corporation, bearing date October 30, 1939, all as set out in application filed by the Norfolk Southern Bus Corporation with Interstate Commerce Commission, No. BMC-F-1093, which application is now pending; and,

WHEREAS, all of the parties in interest in said matters and things hereinabove set out, and parties to said contracts and applications have agreed that the best interest of all parties will be served by a compromise settlement of all the matters in said contracts and applications set out, and that by such compromise and settlement the interest of the public can best be served by the establishment, building up, creating and operating a proper efficient system of transportation of property between Norfolk and Beaufort, North Carolina, as in the certificates of public convenience and necessity and rights under the Grandfather Clause of the Interstate Commerce Act set out, and to that end have agreed, and do mutually covenant to and with each other as follows: (1) That the suit now pending in the Superior Court of

Dare County, wherein R. Bruce Etheridge, R. B. Lennon and Guy H. Lennon, co-partners trading as the Virginia Dare Transportation Company are plaintiffs, against John Habit and Joe Habit, co-partners trading as Habit Brothers Freight Line, and Virginia Carolina Transportation Company, defendants, seeking specific performance of the contract or option given by Habit Brothers Freight Line to the Virginia Dare Transportation Company on and as of August 1, 1938, and to recover damages for failure to comply therewith, will, subject to the approval of the Judge of said Court, be by consent of the parties thereto continued at the next term of the said Court, which will convene for the trial of causes on Monday, May 27, 1940, until the next term of the Superior Court for said County, and will not be tried or heard and no action taken in reference thereto, pending the action by the Interstate Commerce Commission, the Utilities Commission of North Carolina and the State Corporation Commission of Virginia upon the application or applications of the Norfolk Southern Bus Corporation, as hereinafter set out.

(2) Norfolk Southern Bus Corporation will, as vigorously and actively as possible, prosecute its application now pending before the Interstate Commerce Commission, No. MC-F-1093, to purchase a portion of the rights, privileges and franchises to operate as a common carrier by motor vehicle between Norfolk, Virginia, and New Bern, North Carolina, with off-route rights, and the right to transport commodities generally, as set out in the certificate issued to John and Joe Habit, a partnership, trading as Habit Brothers Freight Line, in Certificate MC 37015, which said rights, franchises and privileges are now vested in the Virginia Carolina Company, the said Virginia Carolina Company retaining for its own use, free and clear of any claims of Norfolk Southern Bus Corporation, that part of the franchises and rights set out in said Certificate No. MC 37015, between Edenton, N. C. and Beaufort, N. C., via Windsor, Williamston, Wash-

ington, Greenville, Kinston, New Bern, and thence down to Beaufort, and returning over the same route.

It is agreed and understood that the Virginia Dare Transportation Company, a co-partnership, and its members, the Habit Brothers Freight Line, a co-partnership, and its members, and Virginia Carolina Transportation Company, will all unite with Norfolk Southern Bus Corporation in requesting the Interstate Commerce Commission to grant unto Norfolk Southern Bus Corporation its application for the right to purchase part of the Habit Brothers Freight Line certificate as set out in the application filed in MC-F-1093, upon the terms and conditions set out in the contract of Norfolk Southern Bus Corporation as purchaser, and W. S. Privott, Jr. and H. C. Goodwin, Jr., as Vendors, holding a majority of the stock of Virginia Carolina Transportation Company, all as set out in the said contract of October 30, 1939.

(3) All of the said parties, to-wit: Norfolk Southern Bus Corporation, Virginia Carolina Transportation Company, Virginia Dare Transportation Company, a co-partnership, and its members, will unite in requesting the State Corporation Commission of Virginia to give its approval to such purchase, and will unite in request to the Public Utilities Commission of North Carolina to give its consent to such purchase.

(4) Upon the approval of the contract of purchase of a portion of the franchises of Habit Brothers Freight Line now held by Virginia Carolina Transportation Company, as set out in the aforesaid contract between Norfolk Southern Bus Corporation and W. S. Privott, Jr. and H. C. Goodwin, Jr., dated October 30, 1939, vesting in Norfolk Southern Bus Corporation the right to purchase and have issued to it a certificate, or certificates, to operate as a motor carrier of commodities generally such as are usually transported by motor vehicles, between Norfolk, Va., and New Bern, N. C., by way of Sligo, Elizabeth City, Edenton, Albemarle Sound

Bridge, Plymouth, Washington and New Bern, and also between Elizabeth City and Norfolk, by way of Deep Creek, Norfolk Southern Bus Corporation will pay to Virginia Carolina Transportation Company the contract price as set out in its said contract for the purchase of said rights. The Virginia Dare Transportation Company and its co-partners, and Norfolk Southern Bus Corporation will execute a contract, or contracts, mutually releasing each other from all obligations or liability under the contract of September 12, 1936, whereby Norfolk Southern Bus Corporation agreed to purchase, under certain conditions, certain rights of the Virginia Dare Transportation Company to transport commodities between Norfolk, Va. and Elizabeth City, N. C., by way of Sligo, so that there will be no obligation on the part of either of said parties to carry out said contract, or to recover to the other any damages on account of the failure so to do, and the Virginia Dare Transportation Company will be free to continue to hold, use and operate on and over its said franchise routes from Norfolk to Manteo, N. C., and from Norfolk to Elizabeth City, N. C., by way of Sligo.

The Virginia Dare Transportation Company and its co-partners, will each and all, severally and jointly, cause to be dismissed the suit now pending in the Superior Court of Dare County, N. C., against John and Joe Habit, trading as the Habit Brothers Freight Line, and the Virginia Carolina Transportation Company, wherein the Virginia Dare Transportation Company is asking specific performance of the contract of August 1, 1938, hereinbefore referred to, and the Virginia Dare Transportation Company and its co-partners, and John and Joe Habit, trading as Habit Brothers Freight Line, and Virginia Carolina Transportation Company will mutually release each other from any and all claims, liabilities and demands, growing out of the said contract option of

August 1, 1938, releasing each other from any and all damages or claims of any sort, kind or description, on account of the execution of said option contract of August 1, 1938, and failure of either of said parties to carry out the terms of said contract, or to comply therewith in any way whatsoever. Upon said suit being dismissed and the said release being executed as to the option contract of August 1, 1938, and the contract between Norfolk Southern Bus Corporation and Virginia Dare Transportation Company of September 12, 1936, Norfolk Southern Bus Corporation will pay unto the Virginia Dare Transportation Company the sum of $5,000.00 in consideration of the execution of said releases and dismissal of said suit. Five Hundred ($500.00) Dollars of the said sum of $5,000.00 is presently to be paid as a part of the consideration of the execution of this contract and agreement. The remaining $4,500.00, part of the said $5,000.00, to be paid by Norfolk Southern Bus Corporation to the Virginia Dare Transportation Company, will be paid $3,000.00 in cash within thirty (30) days after the dismissal of said litigation, and the execution of the said releases, and $1,500.00 thereafter to be evidenced by notes of Norfolk Southern Bus Corporation to be paid at such time and in such manner as Norfolk Southern Bus Corporation and Virginia Dare Transportation Company may agree upon.

(5) Upon the granting of authority to Norfolk Southern Bus Corporation to purchase that part of the rights of the Virginia Carolina Transportation Company originally issued to John and Joe Habit, trading as Habit Brothers Freight Line, giving it the right to operate as a common carrier by motor vehicle in the transportation of commodities and property generally, with off-route rights from Norfolk via Deep Creek, and also Sligo to Elizabeth City, Edenton, thence over the Albemarle Sound Bridge to Columbia, N. C., to Plymouth, N. C., and thence to Washington and New Bern, as set out in said application, by the Interstate

Commerce Commission, the State Corporation Commission of Virginia and the Public Utilities Commission of North Carolina Norfolk Southern Bus Corporation will pay unto Virginia Carolina Transportation Company, in the manner set out in the said contract of October 30, 1939, attached to and forming a part of the application of Norfolk Southern Bus Corporation to buy, the purchase price of said rights, as in said contract set out.

(6) Norfolk Southern Bus Corporation and Virginia Dare Transportation Company will, in the manner provided by law, provide for the establishment of through routes and joint rates over their franchise routes between Norfolk, Va., and Manteo, N. C., Norfolk, Virginia, and Elizabeth City, N. C., and points south of New Bern, N. C., and also to such other points as may be agreed upon and reached and served by the respective corporations; the terms and conditions of such through routes and joint rates and interchange of traffic and the division of rates to be in accordance with the provisions of law.

IN WITNESS WHEREOF, the parties hereto, viz: R. BRUCE ETHERIDGE, R. B. LENNON and GUY H. LENNON, co-partners, trading as Virginia Dare Transportation Company; JOE HABIT and JOHN HABIT, co-partners, trading as the HABIT BROTHERS FREIGHT LINE; W. S. PRIVOTT, JR., and H. C. GOODWIN, JR., holders of the majority of the capital stock of the Virginia Carolina Transportation Company; the VIRGINIA CAROLINA TRANSPORTATION COMPANY, a corporation of North Carolina, and NORFOLK SOUTHERN BUS CORPORATION, a corporation of Virginia, have caused these presents to be executed, the said individuals under their hands and seals, and the said VIRGINIA CAROLINA TRANSPORTATION COMPANY by W. S. Privott, Jr., its President, and NORFOLK SOUTHERN BUS

CORPORATION by L. B. Wickersham, its Vice-President and General Manager, all this the 24 day of May, 1940.

R. BRUCE ETHERIDGE (SEAL)
R. B. LENNON (SEAL)
GUY H. LENNON (SEAL)

Co-partners, trading as Virginia Dare Transportation Company.

---------- (SEAL)
---------- (SEAL)

Co-partners, trading as the Habit Brothers Freight Line.

W. S. PRIVOTT, JR. (SEAL)
H. C. GOODWIN, JR. (SEAL)

VIRGINIA CAROLINA TRANSPORTATION COMPANY,
By: W. S. Privott, Jr.
President.

NORFOLK SOUTHERN BUS CORPORATION,
By: L. B. Wickersham
Vice-President and General Manager.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NO———

VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,

Petitioner and Appellee below

vs.

NORFOLK SOUTHERN BUS CORPORATION,

Respondent and Appellant below

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF COURT BELOW

The opinion in the Circuit Court of Appeals, Fourth Circuit was delivered January 7, 1947, and is not yet reported.

JURISDICTION

1. The date of decision to be reviewed was January 7, 1947.

2. The Statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. A. 347 (a) Judicial Code Sec. 240, Supreme Court Rule 38 (5) (b).

3. The decision of the Circuit Court of Appeals, in itself accepting said testimony and finally disposing of the case therein, constituted a substantial departure from the accepted and usual course of judicial procedure and was of such character as to call for an exercise of this Court's power of supervision. It preempted to the Circuit Court of Appeals the function of a Jury and substituted a finding by the Court for

a finding by the Jury. It violated the Constitutional provision for a Jury trial (VIIth Amendment).

It further was probably in conflict with applicable decisions of this Court on a federal question. As disclosed by the Answer Virginia Dare had demanded a Jury trial herein.

4. Among others, the following cases are believed to sustain said jurisdiction:

Clone v *West Va. Pulp & Paper Co.*, 91 L. Ed. Adv. Sheet No. 9, p. 683 (decided March 3, 1947).

Burns Mortgage Company v *Fried*, 292 U. S. 487

Reynolds v *United States*, 292 U. S. 443, 54 S. Ct. 800, 78 L. Ed. 1353.

Southern Railway Company v *Walters*, 284 U. S. 190, 53 S. Ct. 58, 76 L. Ed. 239.

McCandless v *United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

Stringfellow v *Atlantic Coast Line*, 290 U. S. 322, 54 S. Ct. 175, 78 L. Ed. 339.

Ormsby v *Chase*, 290 U. S. 387, 54 S. Ct. 211, 78 L. Ed. 378, 92 A. L. R. 1499.

Dimick v *Schiedt*, 293 U. S. 474, 79 L. Ed. 603.

Statement of the Case

The case in broad outline has already been stated in the preceding Petition for Writ of Certiorari, page 1, and the statement there made is hereby adopted and made a part of this Brief.

The Court in its opinion first holds that the tendered testimony was competent and should have been admitted on the trial below. It then proceeds itself to accept this testimony as establishing that an additional agreement limiting the schedules and prorating the receipts was in fact made, though such an agreement contradicts flatly the provisions of the written contract which contained no limitation upon schedules and no provision for any such division of the receipts of

the two companies. The Court then, upon the basis of its own acceptance of this testimony as final and conclusive, proceeds to adjudicate the contract (Exhibit 2, Appellant's Brief in Court below page 6 and Appendix to Appellant's Brief pages 210-215) as illegal and void. The Circuit Court of Appeals then remands the case for final judgment against the counterclaim.

Specification of Errors

Petitioner contends that the Circuit Court of Appeals erred:

A—In holding said proffered evidence was admissable.

And, without regard to the correctness of this ruling on admissability, that the Court erred,

B—In preempting the functions of a Jury (demanded by Virginia Dare in its Answer) by accepting this proffered testimony and more particularly the Norfolk Southern's construction of it, as final and conclusive as to the alleged additional and unlawful agreement.

C—In denying to Virginia Dare the chance, upon a new trial, to reply to this evidence, which had been excluded in the trial in the District Court.

D—In ignoring the contrary evidence already in the Record.

E—In declaring the contract sued upon by Virginia Dare illegal and invalid on the basis of this rejected testimony, instead of having it submitted to a Jury in a new trial,

Several objections to the Court's declaration of invalidity, and several probably conflicting decisions, will be set out in the argument on this point.

Argument

POINT A

The testimony offered by Norfolk Southern and excluded by the trial Court consisting both of letters and testimony of the witnesses Bragg and Nelms (Appendix to Appellant's

Brief, pages 93-102, 139-146 and 147-156) was rightly excluded by the Trial Judge.

(1) Because there was and is no ambiguity in the writing (Exhibit 2, page 6, Appellant's Brief). This language is plain and free from doubt or uncertainty. A reading of the Exhibit, and particularly of sections 2 and 3 discloses no limitation upon the number of schedules but a clear safeguarding of Virginia Dare's right to run more than two schedules if and when it so desired. Likewise, there was no slightest provision of pooling and division of revenues, except upon a basis which is manifestly legal, clearly set forth in this writing and conforming with the comparative distances hauled by the two lines signing this contract.

(2) Because the tendered testimony instead of clarifying the language of Exhibit 2 flatly contradicted it as this testimony is interpreted by Norfolk Southern and the Circuit Court of Appeals;

(3) Because the alleged contradiction came in the form of parol utterances made long after the date of the writing;

A reading of the opinion of the Circuit Court of Appeals discloses that this Court begins its discussion by stating the contention of the two parties and ignores the fact that Norfolk Southern's contention of illegality in the contract had no slightest basis or foundation in the writing itself and depended for its existence upon the introduction of testimony outside of the writing and flatly contradicting it. So the assumption in the opinion of the Circuit Court of Appeals that there was a contradiction in the writing or room for doubt as to its meaning or ambiguity in its provisions is an assumption without slightest justification and founded only on a contention made by Norfolk Southern upon the basis of evidence outside of and contradicting the contract as memorialized by the writing under consideration. The Circuit Court of Appeals thereupon proceeds to admit this contradictory

testimony to clarify a supposed but non-existent ambiguity or prove an additional and contradicting agreement.

The writing (Exhibit 2) was and is plain. The consideration moving from Virginia Dare to Norfolk Southern (namely, the Habit two-way franchise, release from requirement to pay $14,000.00 cash to Virginia Dare for a franchise between Norfolk and Elizabeth City as provided in the superceded contract, the release from obligation to provide free of cost to Virginia Dare terminal facilities at Sligo (approved by I. C. C. when this tentative contract was submitted for its consideration and approval) were all paid in advance and no further payment for terminal pick-up and delivery services were required for two trips. It was, however, plainly provided that Virginia Dare would have to pay for these for or in connection with any additional trips it might make. Virginia Dare under the contract paid no more for two trips whether it ran two or two hundred schedules, and conversely, it was relieved of no charge by not running more than two trips since it incurred no additional expense, it being considered by the parties that Virginia Dare had paid for this much service in advance.

But without regard to the correctness of the trial Court's ruling on the admissibility of this testimony, the Petitioner submits that the Circuit Court of Appeals erred

Point B

In preempting the functions of a Jury (demanded by Virginia Dare in its answer) by its acceptance of the proffered testimony, and more particularly, Norfolk Southern's construction of this testimony, as final and conclusive as to the existence of an additional agreement, the Court erred.

Virginia Dare having, in its answer, demanded its right to trial by Jury, not even the Circuit Court of Appeals, respectfully speaking, could deprive it of this right guaranteed

by the VIIth Amendment to the Constitution. Any refusal or declination to preserve this right constitutes a serious and substantial departure from ordinarily accepted and usual procedure.

As stated by the court in *Dimick* v *Schiedt,* 293, U. S. 474, 79 L. Ed. 603, 611:

> ". . . any seeming curtailment of the right to a Jury trial should be scrutinized with utmost care."

The procedure in the Circuit Court falls clearly within the condemnation of the language in the *Dimick* case to the further effect that

> ". . . how can it be held . . . that that Court . . . may . . . bring the constitutional right of the Plaintiff to a Jury trial to an end in respect of a matter of fact which no Jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the Plaintiff to forego his constitutional right to the verdict of a Jury . . ."

Point C

There was error in the Court's denying to Virginia Dare the chance upon a new trial to reply to this evidence which had been excluded in the trial in the District Court.

This tendered testimony consisted of letters written long after the execution of the writing, Exhibit 2, and of testimony as to the division of freight and revenue. Since the testimony was excluded at the trial—and we think correctly—there was no need then for Virginia Dare to offer evidence by way of explanation or reply. If, however, the testimony is to be admitted, then by every rule of accepted procedure, Virginia Dare is entitled to an opportunity to offer evidence by way of either explanation or reply. *McCandless* v. *U. S.,* 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

Such is a right which by all accepted and usual procedure belongs to Virginia Dare, which is taken from it by the procedure directed by the Circuit Court of Appeals.

POINT D

In ignoring the contrary evidence already appearing in the record and itself passing upon the existence of this additional agreement, the Circuit Court of Appeals again offended against the requirement that it should observe accepted, usual and ordinary procedure. Compare *Southern Railway Co.* v *Walters,* 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

It cannot be denied that the record contains and contained already certain contradictory testimony.

(a) As to any agreement to divide freight revenues, we refer to the positive statement of the witness Lennon (page 106 of Appendix to Appellant's Brief) that freights were divided between the two lines according to the shipper's "choice" of the line over which he desired the freight to move or in the words of the witness "as consigned by the shipper on the bills of lading."

(b) As to the suggestion that freight rates were increased by this arrangement or by anything done under Exhibit 2, it appears by reference to the testimony which was offered and excluded (1) that the rates were fixed by law through the Interstate Commerce Commission (See Appendix to Appellant's Brief, pages 152-3) and could not therefore be changed by Exhibit 2 or any other agreement and (2) that the rates were not raised under this agreement or because of it, but were made equal and were equal at the time the agreement went into effect (See Appendix to Appellant's Brief, Page 154), and further, that the only effort to raise these rates thereafter was apparently joined in by the Norfolk Southern, but Virginia Dare refused to participate in this effort (See pages 154-5, Appendix to Appellant's Brief). All this was a part of the testimony tendered and excluded. It is difficult to understand, therefore, how the Court obtained such an impression as it certainly voiced an exactly contrary conclusion to what the record discloses.

Notwithstanding this contradictory testimony already in the record the Circuit Court of Appeals in its opinion proceeded to assume and accept, as established facts, Norfolk Southern's contention, without any evidence to support it, that through the contract under consideration (Exhibit 2) shipments and freights were arbitrarily divided on a one-third and two-thirds basis, that rates were raised in consequence of the signing of this Exhibit 2, and that schedules were limited to two for Virginia Dare, when on the face of the contract, Virginia Dare was at all times free and entitled to run twenty or two hundred schedules a week if it wished or was required so to do.

It must be borne in mind that schedules as well as rates are required to be filed and approved by the I. C. C. (See page 152-3, Appendix to Apellant's Brief); that it is not a question of how many schedules were actually run by Virginia Dare but whether the right to run more was actually limited by this contract; that Norfolk Southern, by its purchase from Virginia Dare, acquired the Habit franchise and the right thereunder to run schedules as it pleased between Norfolk and Elizabeth City and lastly, that there were "six or more" carriers at that time between Norfolk and Elizabeth City (See Appendix to Appellant's Brief, page 152). Certainly, there was neither actual nor potential monopoly here.

POINT E

In declaring the contract sued upon by Virginia Dare (Exhibit 2) illegal and invalid on the basis of the Circuit Court of Appeals' acceptance of Norfolk Southern's interpretation of the rejected testimony instead of submitting the question to a Jury the court again departed from accepted procedure, and its opinion is in probable conflict with other applicable decisions of this Court.

In *McCandless* v *United States,* 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205, there was before the Court a condem-

nation proceeding in which there was tendered by the Petitioners evidence tending to establish the most profitable use to which the land in question could probably be put in the reasonably near future and the availability of certain improvements in the nature of water supply. The District Court excluded the testimony upon Respondent's suggestion as to its immateriality. The Circuit Court of Appeals, 9th Circuit, held that the evidence was improperly excluded but that the error was not prejudicial and therefore affirmed the District Court. Mr. Justice Southerland, expressing the opinion of the Supreme Court in reversing and remanding the cause to the Trial Court, agreed with the Circuit Court that the exclusion of the testimony was error, but on the contrary reversed the Circuit Court on the grounds that Petitioner should have been given opportunity to make his offer of testimony more specific and to give evidence supplementing the issue of value. In the case at bar, no opportunity to explain or contradict the testimony offered by Norfolk Southern has been afforded Virginia Dare and in fact in the light of its rejection in the lower Court, counsel were not required to go forward with evidence tending to contradict such implication as may arise therefrom.

Compare also, *Shepard* v *United States,* 290 U. S. 96, 54 S. Ct. 22, 28 L. Ed. 196, in which a reversal was ordered for prejudicial error in the admission of incompetent hearsay evidence attempted to be supported on untenable grounds in the majority opinion of the Circuit Court of Appeals.

See also *Ormsby* v *Chase,* 290 U. S. 387, 54 S. Ct. 211, 78 L. Ed. 378, 92 A. L. R. 1499, in which there was an erroneous application of rules of conflicts of laws.

Also see *Clone* v *West Virginia Pulp & P. Co.* reported in Vol. 91 Adv. Sheets, L. Ed. Page 685. (Decided March 3, 1947) wherein a substantial question of Federal Procedure was presented.

(1.) *Test of Illegality*

While Petitioner again denies that anything it did was unlawful or was done in an illegal manner, the following authorities should be cited:

> "The rule has been stated to be that if an agreement can by its terms be performed lawfully, it will be treated as legal even if performed in an illegal manner." 12 Am. Jur. 647.
>
> "To invalidate the contract, the illegality must be inherent and not merely collateral. The contract is to be judged by its character and not by what the parties may do, or attempt to do, with the fruits of it, and the courts may look to the substance and not to the mere form of the transaction. If the contract itself discloses no illegality and may be performed in a legal manner, it is not rendered unenforceable by the fact that it may also be, or is actually, performed in an illegal manner." 17 C. J. S. 545.
>
> "The test to be applied is not what is actually done but that which may or might be done under the terms of the contract." 17 C. J. S. 564.
>
> "The doing of the act in violation of statute will not necessarily vitiate a contract which is connected with it only incidentally because it relates to property affected in some degree by the statute." 17 C. J. S. 557.
>
> "This contract is to be decided not by what unlawful means may have been used to bring about a just and honest result, but whether by its terms it necessarily implies the use of unlawful means in its accomplishment." *Stancell* v *Roach,* 147 Penn., 27 A. L. R. 143.
>
> See also *Arlington Hotel* v *Ewing,* 124 Tenn. 550. *Old Dominions Transportation Company* v *Hamilton,* 131 S. E. 850, and 853.

Smythe Brothers et al v *Boresford,* 128 Va. 137, 104 S. E. 371.

Macco Construction Company v *Farr et al* (see C. C. A. 9th) 137 F. 2d, 52.

(2.) *Participation in or Responsibility for Illegality*

And certainly, where as in this case, the party complaining (Norfolk Southern) itself prepared the instrument under attack and enjoyed and still enjoys all of the benefits it got under the arrangement and acted under this arrangement without questioning its validity for four and one-half years, and the principal benefits received by the other party (Virginia Dare) were the provision of this terminal pick-up and delivery service for two trips a week, it is not in law or equity, in a position to raise such a question at this time and avoid its own obligations under the contract, while still enjoying its fruits, by suggesting an illegality in the arrangement.

Macco Construction Company v *Farr et al,* Supra.

In this case the Court well said:

> "It is always the position of the law to avoid absurdities, injustices and hardships. You may be sure it never was the Legislative intention that beneficiaries of the violation, particularly if they were themselves instrumental in bringing about the breach, should thus be relieved from the just obligation of the contract."

(3.) *Conduct as Distinguished from Contract*

On the question of whether under a mistaken interpretation of what an entirely legal contract provides, the parties thereto conduct themselves in an illegal fashion, the attention of the Court is especially directed to *Old Dominion Transportation Company* v *Hamilton,* 131 S. E. 850.

In this case, the Supreme Court of Appeals of Virginia made a clear distinction between the *illegality of the conduct*

of the parties and *the nature of the contract itself* and quoted with approval 2 Page on Contracts, Section 663 as follows:

> "The illegality or validity of a contract is to be determined by its tendancy as the parties make it and not by actual *result* as the parties *perform* it. If it can by its terms be performed lawfully, it will be treated as legal, even if it is actually performed in an illegal manner, or even if one of the parties intends illegal performance; and still more, if illegal performance is merely possible." (Italics for emphasis supplied.)

In Williston on Contracts, Section 1779, it is said:

> "It was early decided that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. This is the simplest form of the problem of partly illegal contracts. *If legal consideration has actually been given and a unilateral contract formed,* or if the promises are under seal and binding without consideration, the *rule thus early established has never been question.*" (Italics supplied.)
>
> Neither does a plea of illegality justify a breach. *Northwestern Consol Milling Company* v *William Campbell and Sons,* 177 F. 786, 788.

A probably conflicting decision of this Court is *Small Company* v *Lamborn Company,* 267 U. S. 246.

(4.) *Doctrine of unreasonable restraint*

As to the doctrine of unreasonable as distinguished from reasonable restraints, see *Standard Oil Company* v *United States,* 221 U. S. 1 and other cases cited on page 26 of Appellees Brief in the Circuit Court of Appeals.

(5.) *Doctrine of Seperability*

Further, it is suggested respectfully that even if the contract here under consideration had contained a clause of the

character suggested in the tendered testimony, such would not and could not affect the perfectly legal provisions of that contract which are set up in paragraphs 3, 4 and 5, regarding the establishment of joint terminals, etc., and which constitute the basis of Virginia Dare's counterclaim herein. General authorities and probably conflicting decisions of this Court are:

12 Am. Jur. 739.

McCullough v *Virginia*, 172 U. S. 102.

Chicago, etc. Railroad Company v *Pullman Southern Car Company*, 139 U. S. 79.

U. S. v *Bradley*, 10 Pet. 343.

12 Am. Jur. 737.

17 C. J. S. 677.

See also other cases cited on pages 24 and 25 of Appellee's Brief in the Circuit Court of Appeals.

(6.) *No Requirement of Advance I. C. C. Approval*

A. As to terminal facilities.

Admitting the supervisory power of the I. C. C. over joint terminals, there is no requirement of advance approval as a prerequisite to validity. Terminal contracts and contracts for terminal service are normal, usual and purely managerial functions and joint terminals or joint terminal services are quite normal arrangements.

Skaggs v *Kansas City Terminal Ry. Co.*, 233 F. 837.

B. As to pick-up and delivery service.

APPLICATION OF UNIVERSAL CARTAGE COMPANY ON THE PURCHASE OF DIXIE CARTAGE COMPANY, 37 MCC 107, 110, an exact parallel.

APPLICATION OF CONSOLIDATED FREIGHT LINES, INC., 11 MCC 131-136.

APPLICATION OF MASON CITY WAREHOUSE CORP., 26 MCC 646, 647.

For the above reasons, we suggest the Petition for Certiorari should be granted.

Respectfully,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1217

VIRGINIA DARE TRANSPORTATION COMPANY, INC.
PETITIONER

vs.

NORFOLK SOUTHERN BUS CORPORATION
RESPONDENT

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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SUBJECT INDEX

TABLE OF CITATIONS

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BRIEF IN OPPOSITION TO GRANTING CERTIORARI

We submit that the *certiorari* prayed for by Virginia Dare Transportation Company, Inc., should not be granted.

Virginia Dare's application for *certiorari* and the brief in support thereof attempt to get away from the illegal contract of June 6, 1940 (Record 210-215), which is the contract in question in this case, and the

alleged breach of sections 3 and 4 of which is the heart and soul of the counterclaim (Record 6, 7), and to bring in an irrelevant contract of May 24, 1940, which has no bearing upon the present question, and which was not even printed in the printed record, but has been printed for the first time with Virginia Dare's petition for *certiorari* at page 11.

We submit that the contract of June 6, 1940, in controversy in this case, is so plainly illegal and contrary to the Federal Statutes that Virginia Dare's only hope is to bring in some other matters not connected with that contract and divert the court's attention from the contract of June 6, 1940, on which contract the counterclaim depends entirely, and for supposed breach of which the jury rendered a verdict on the counterclaim for $60,000 for Virginia Dare. (Record 188, 189).

The contract of May 24, 1940, serves no purpose, either in the record or by reference in petition or brief, to clarify or justify the Contract of June 6, 1940, held below to be vicious, or to throw any light upon the petitioner's application for review. The only effect of suppressing the vicious document of June 6, 1940, and substituting an innocuous one appears to be to turn away attention from the contract of June 6, 1940.

On the trial of the case in the District Court, Norfolk Southern repeatedly raised the question of the illegality of the contract of June 6, 1940 (Record 46), and also requested a directed verdict against Virginia Dare on the counterclaim (Record 180, 203), both before and after verdict; which request for directed verdict ought to have been granted; and immediately

after verdict asked judgment pursuant to Rule 50, Rules of Civil Procedure; and the Circuit Court of Appeals would have been doing a vain thing to send the case back for further trial by the District Court when final judgment should have been entered in favor of Norfolk Southern on the counterclaim, pursuant to the Rules of Civil Procedure, Rule 50.

When the contract of June 6, 1940, is inspected, it clearly demonstrates that the two *competing* carriers of freight by motor trucks, Virginia Dare and Norfolk Southern, whose largest places of competition were Norfolk, Virginia, and Elizabeth City, North Carolina, definitely agreed that Norfolk Southern would furnish, free of charge to Virginia Dare, all terminal and pick-up and delivery services at those places so long as Virginia Dare would run only two round trips a week between those places, Virginia Dare having previously run one or more round trips *every day* except Sunday, and upon the contract taking effect, always thereafter *reducing its hauls* to only two round trips a week. (Record 81).

This contract was never submitted to the Interstate Commerce Commission, and clearly violated both the Sherman Act and the Interstate Commerce Act.

The counterclaim of Virginia Dare relied upon breach of sections 3 and 4 of the contract of June 6, 1940, which sections read as follows (Record 212, 213):

> "(3) Norfolk Southern Bus Corporation will establish and operate a freight terminal at Norfolk with pick-up and delivery service and will permit Virginia Dare Transportation Company

the use of same on a joint user basis—it being understood, however, that so long as Virginia Dare Transportation Company operates two or less round trips per week between Norfolk and Elizabeth City, no charge will be made for common user or terminal service including pick-up and delivery. In the event schedules exceed this, then the tonnage so handled on additional trips will be allocated at the same unit costs as apply to Norfolk Southern Bus Corporation in the handling of its own business; it being understood that in the event the control of Virginia Dare Transportation Company shall be changed to other parties, then this agreement shall be null and void;

"(4) Norfolk Southern Bus Corporation shall establish and operate a freight terminal at Elizabeth City and will permit Virginia Dare Transportation Company to use same on a *common user basis*. So long as Virginia Dare Transportation Company operates two round trips or less from Elizabeth City to Norfolk, no charge shall be made for this including pickup and delivery except that on business from Elizabeth City to Manteo, Virginia Dare will with its lay-over trucks make such pickup and when Norfolk Southern trucks do this at times when Virginia Dare trucks are not available, Virginia Dare will perform for Norfolk Southern Bus Corporation an equal service, based upon 100 lbs., when they are not in use in Elizabeth City.

> "The arrangements herein outlined in (3) and (4) may be discontinued on thirty (30) days written notice from Virginia Dare Transportation Company in which event the two companies will endeavor to arrive at a working plan satisfactory to both. No terminal charges shall be allocated to either company taking into consideration through tonnage on through trucks which do not receive or deliver said tonnage at Elizabeth City."

After adopting in its brief the statement contained in its petition the petitioner insists that the Circuit Court of Appeals erred in several particulars, designated A to E, which we will mention hereafter.

But the petitioner having spoken very slightly on the quality of the Contract of June 6, 1940, upon which alone its counterclaim depends, we deem it appropriate here to emphasize the correct views upon that instrument.

We maintain:

(1) It violates the Sherman Anti-Trust Act, 26 Stat. 209 (1890), 50 Stat. 693 (1937), 15 U. S. Code 1, and kindred statutes.

(2) It is violation of the Interstate Commerce Act, as amended by the Motor Carrier Act and the Transportation Act of 1940, Title 49 U. S. C. A. Among other vices it admittedly lacks the requisite approval of the Interstate Commerce Commission.

RESTRAINT OF TRADE

The familiar principle of the Anti-Trust Laws that every contract, combination or conspiracy in restraint of interstate commerce is illegal and unenforceable has been presented to this court, and others, in a variety of ways. Rules which may be deduced from the decisions are that the purpose and intent of such agreements, as well as their letter, the inducement for their making and the operation thereunder, the potential as well as the obvious and actual effect, are all matters to be considered in determining whether the arrangement offends.

Also it is well recognized that the first step toward monopoly is as offensive as the final one. The devious methods adopted are often but entering wedges which may open a wider breach. These the courts have sought to curb regardless of disguise.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

United States v. *Joint Traffic Association,* 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

Standard Oil Co. v. *United States,* 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

United States v. *Union Pacific Railroad Co.,* 226 U. S. 87, 33 Sup. Ct. 53, 57 L. Ed. 124.

United States v. *Reading Co.,* 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.

United States v. *American Tobacco Co.,* 221 U. S. 181, 31 Sup. Ct. 632, 55 L. Ed. 663.

Joint terminals and terminal services have in many cases been the first step to be followed by others tending to restrict the freedom of trade.

United States v. *Terminal R. Asso.*, 224 U. S. 383, 56 L. Ed. 811.

Union Pacific R. Co. v. *U. S.*, 313 U. S. 450, 85 L. Ed. 1453.

In the case at bar it seems clear that Norfolk Southern and Virginia Dare entered into arrangement for common user of terminal facilities and pick up and delivery service in such manner as to lead to a lessening of public services. The motive and the result seem, from the contract itself, the attending circumstances, and the ensuing operation, to have been to eliminate competition between these two carriers, at least for all beyond two days per week, and to establish an arrangement by which other competitors should be placed at disadvantage. It was a long step toward monopoly.

The contract of June 6, 1940, was on its face absolutely illegal and void. Its heart and soul was to reduce competition by withdrawing Virginia Dare hauls from all week days to twice a week, in consideration of Norfolk Southern rendering free terminal, pickup and delivery service in consideration of decreased competition.

THE EVIDENCE

In considering whether the Circuit Court of Appeals is supported in its decision by evidence sufficient to show the illegality of contract we may consider the proofs offered in the following aspects:

1. The *Contract itself* is illegal on its face. By its terms it provides that the two companies will pool their services and facilities. Every week day Norfolk Southern will provide for Virginia Dare free terminal pickup and delivery service, provided Virginia Dare shall operate only twice a week instead of six times as before. Each will carry in its trucks goods consigned over the other's line.

Section 2 of the contract sets out a schedule of division of revenues in which it is clearly contemplated that one company shall perform the line haul of the other. (R. 211, 212.)

Section 3 provides that Norfolk Southern shall permit Virginia Dare the use of its freight terminals and pickup and delivery services "on a joint user basis," it being understood however that "*so long* as Virginia Dare Transportation Company operates *two or less* round trips per week between Norfolk and Elizabeth City, *no charge* will be made." (Italics added).

Section 4 of the contract makes similar provision with respect to services at Elizabeth City.

That the discontinuance of trips by Virginia Dare on four days per week was the impelling inducement for the arrangement is manifest upon the face of the instrument. That, even if it were all, is sufficient to sustain the judgment of the Circuit Court of Appeals.

2. THE ADMITTED EVIDENCE in the District Court (in addition to the contract itself) is ample to establish the illegality, both in (a) purpose and (b) operation; without contradition.

Guy H. Lennon, the General Manager of Virginia Dare, who handled all negotiations and directed all affairs testified at page 73 that in the use of terminals and the utilization of pickup and delivery services his company was acting under the contract of June 6, 1940.

At pages 78-80 Mr. Lennon testified that prior to the operation under that paper his company had operated between Norfolk and Elizabeth City as well as between those cities and his company's home at Manteo, and that this had continued for some years.

At page 81 Lennon says these operations were daily except Sunday.

Also at page 81 he says that as soon as Norfolk Southern started to operate Virginia Dare ceased to operate daily between Elizabeth City and Norfolk and operated only two days per week, Tuesday and Thursday.

At page 82 Lennon testifies that his company "continued not to operate between Norfolk and Elizabeth City in the carrying of any freight from that time until the end of 1944," when respondent discontinued the facilities.

At pages 83 and 84 Mr. Lennon states that during a part of the time Virginia Dare rates were lower than Norfolk Southern on many articles so that a shipper was compelled to pay the higher rate on days other than Tuesday or Thursday, because "He could not use the Virginia Dare truck, because that was not running." On Tuesdays and Thursdays competitive rates were effective, but on Mondays, Wednesdays, Fridays and Saturdays the competition was eliminated. (See bottom of Page 83).

At page 84 Mr. Lennon testified to the pooling of facilities of line haul as well as terminals, saying that the terminal agent "would bill out freight on Tuesday and Thursday on our trucks * * * and on all other days on Norfolk Southern."

These statements, admitted in evidence in the District Court, not contradicted, are ample to show illegality and therefore to support the direction of verdict and judgment against petitioner as ordered by the Circuit Court of Appeals. They establish a transaction illegal both in purpose and operation, both in design and execution.

Thus, in addition to being illegal on its face, the illegality of the contract of June 6, 1940, was doubly shown by the evidence which was actually admitted before the jury, the admitted evidence of Virginia Dare's own General Manager and Treasurer, Guy H. Lennon (R. 24) distinctly showing that upon operation beginning under this contract Virginia Dare ceased hauls between Norfolk and Elizabeth City, except two round trips a week. See especially his admitted testimony, Record 81 and 83, and also his testimony, Record 90, saying the matter was not submitted to Interstate Commerce Commission.

We submit that such an arrangement, however disguished, is inhibited by the Anti-Trust Laws and the decisions of this court. The substance of the arrangement is amply established by evidence.

INTERSTATE COMMERCE ACT

What has been said above of evidence of illegality under the Anti-Trust Acts, as amended, also applies to the Interstate Commerce Act.

The contract itself and also the evidence admitted in the District Court clearly establish a case of pooling of services, traffic and facilities, if not of earnings. Terminals were to be enjoyed on a common user basis. Pickup and delivery were to be performed by one company for both in common. Line haul was to be performed by either company which might make the day's trip for both itself and the other. Trucks of both were made available. Loadings were to be kept at a monthly proportion of one-third and two-thirds.

49 USCA 5 (1) forbids any such arrangements without specific approval of I.C.C., and declares them unlawful.

49 USCA 5 (2) provides the machinery by which approval may be obtained.

Terminal services are within the supervisory powers of the commission.

United States v. *Brooklyn Eastern Dist. Terminal,* 249 U. S. 296, 63 L. Ed. 613, 16 A.L.R. 527.

Union Stock Yard & Transit Co. v. *United States,* 308 U. S. 213, 84 L. Ed. 198.

Union Pacific R. Co. v. *United States,* 210 U. S. 450, 85 L. Ed. 1453.

New York Dock Ry. v. *Penn. R. Co.,* 62 F. (2d) 1010 (CCA 3rd Circuit).

United States v. *Wabash R. Co.,* 321 U. S. 403, 88 L. Ed. 827.

United States v. *Terminal R. Asso.*, 224 U. S. 383, 56 L. Ed. 811.

As to pickup and delivery services rendered by common carriers, these are by express provision of statute regulated as a part of the transportation.

3. THE EXCLUDED EVIDENCE of illegality may be considered in two categories (a) admissions from petitioner's principal officer and (b) other evidence.

3(a). In the first class we find:

At page 93 of Appendix a letter of November 11, 1940, from Mr. Wickersham (now deceased) to Mr. Lennon makes reply to some complaint Mr. Lennon seems to have made about compliance with the understanding. Mr. Wickersham says:

> "Of course, there will be variations, as you will readily understand, from day to day but a record will be kept and comparisons made so that by the end of the month the loading can be brought into line on the basis of two-thirds Norfolk Southern and one-third Virginia Dare —you handling the one-third on your truck and we handling the two-thirds on ours and the billing for shipments placed on each company's trucks made by and for that company."

At page 99 is a letter from Mr. Lennon to Mr. Wickersham referring to the letter just quoted and saying:

> "Under date of November 12, 1940, we wrote to you, requesting that we be mailed a daily

> manifest, showing total freight hauled by Norfolk Southern trucks from Norfolk to Elizabeth City, in order that we might be able to check revenues due us, under the one-third, two-thirds division, as outlined in your letter of November 11th, 1940, and accepted by us."

And at page 101 is another letter from Mr. Lennon to Mr. Wickersham dated July 28, 1943, reading:

> "Under date of June 6, 1940, we signed an operating contract with the Norfolk Southern Bus Corporation. This contract covers the movement and handling of freight over the routes between Norfolk, Virginia, Elizabeth City, North Carolina, and Manteo, North Carolina. On several occasions there has been some confusion as to the handling of freight between Norfolk and Elizabeth City, probably due to the fact that your Norfolk Agent was not familiar with the terms of the contract.
>
> "It was agreed between us that tonnage between Norfolk and Elizabeth City should be divided, two-thirds Norfolk Southern and third Virginia Dare."

Respondent submits that these statements made by the principal officer and general controller of the affairs of the petitioner, who negotiated for it the Supplementary Contract in question, undertaking to interpret it in operating terms, and actually insisting upon things he says were agreed, can hardly be denied by petitioner or explained away.

To remand the case that petitioner may be given opportunity to deny or explain away such unequivocal matter would indeed be vain.

3(b). As to Excluded Evidence Other than Admissions, the same may be said. This largely consisted of the testimony of Mr. Bragg and Mr. Nelms (Record pp. 137-156) with reference to transportation practices and freight rates. They spoke in enlargement of but not in variance from evidence already in the record. The petitioner's reading of the Circuit Court of Appeals opinion may claim to the minds of its counsel that the court based its decision upon the excluded letters and testimony. It does not so read to our minds. That court, without this exclude evidence, has found ample proof of illegality. (Record 227).

In no aspect then do we find that the Circuit Court of Appeals has preempted the function of the jury. It has only exercised a function long practiced by the courts, and which the courts should not surrender.

Regardless of all excluded evidence the illegality of the contract of June 6, 1940, was clearly manifested, and that it violated both the Sherman Act and Interstate Commerce Act, and was not submitted to Interstate Commerce Commission.

We submit that the statement of the case by Virginia Dare is very defective, and Norfolk Southern's cross petition correctly states the case and facts.

The authorities relied upon by Virginia Dare, we maintain are not at all in point, and are merely a show of authority, for example:

In *Clone* v. *West Virginia Pulp and Paper Co.*, decided March 3, 1947, 91 L. Ed. Adv. Sheet 9, p.

683, no motion for judgment had been made under Rule 50 of the Rules of Civil Procedure, but such motion had been made in the case at bar. (R. 203, 180, 46).

Reynolds v. *U. S.*, 292 U. S. 443; 78 L. Ed. 1353, seems to have no bearing whatever on the case at bar, but in that case the judgment was reversed with directions to enter final judgment below.

McCandles v. *U. S.*, 298 U. S. 342; 80 L. Ed. 1205, is, like the other cases, out of point, and merely holds that the rejection of relevant evidence was prejudicial.

The minute division of specifications of error on page 23 of petitioner's brief may be shortly answered.

A

Claims that the evidence excluded by the District Court should have been excluded.

We submit that it was obviously admissible but regardless of that evidence the illegality of the contract of June 6, 1940, was clear.

B

Claims that the Circuit Court of Appeals usurped the rights of the jury.

We submit that the Appellate Court was well within its power and duty.

Indeed the petitioner offers no sound reasoning. Its only citation to sustain the point is *Dimick* v. *Schiedt*, 293 U. S. 474, 79 L. Ed. 603. While that case very

naturally recognizes the general principle, the fact situation there involved differs too widely from that in the present case, for the decision to be of assistance. There the question was whether a judge may increase an inadequate tort verdict with the consent of the defendant against whom it is rendered, but against the wishes of the plaintiff. There the lower court had entered judgment for an amount greater than the verdict and in so doing denied the plaintiff the opportunity to seek even more from a second jury. Nowhere in the record of that case did there appear an admeasurement of damages, as would have been the case if the plaintiff had sued for a fixed sum, as on a note. And the issue drawn in question on appeal was that of damages only.

In the case at bar the Circuit Court of Appeals found a record presenting clearly and unequivocally transaction so illegal that no jury could be permitted to find it otherwise. On the counterclaim the burden was on petitioner. It failed to make out its case. The trial court should have withdrawn the counterclaim from the jury as upon demurrer to evidence or directed verdict. This power, universally exercised by the courts has never been considered to "preempt" the jury's functions.

C

Petitioners point C is but a repetition of its point B, and requires no further attention.

D

Petitioner seems to strain in its contention that the Circuit Court of Appeals should have sent the case back for new trial because Mr. Lennon had said that shippers had a choice of carriers. To assert that when a shipper sought to exercise such a choice he was allowed to do so, is certainly not at variance with the one-third, two-thirds loading practice.

As to the freight rates being fixed by law we think petitioner is in error. Interstate Commerce Commission approves but does not initiate. Approval is ordinarily had in the absence of opposition. There is in the record no contradiction of Mr. Lennon's own statement that there was for a time a difference between the rates of the two companies, and that Virginia Dare ceased competition four days out of six.

E

Petitioners point E is but a repetition of its point B, and requires no further attention.

We respectfully submit that there is no reason whatever for *certiorari* being granted in this case.

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Norfolk, Virginia.
J. KENYON WILSON,
Elizabeth City, N. C.
ARTHUR J. WINDER,
Norfolk, Virginia.
JAMES G. MARTIN,
Norfolk, Virginia.
Counsel for Norfolk Southern Bus Corporation.

No. 1218

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

NORFOLK-SOUTHERN BUS CORPORATION,
PETITIONER (PLAINTIFF)

vs.

VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
RESPONDENT (DEFENDANT)

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

By S. BURNELL BRAGG,
Union Station, Norfolk, Va.
ARTHUR J. WINDER,
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RICHMOND 7, VIRGINIA

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SUPREME COURT OF THE UNITED STATES

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PETITIONER (PLAINTIFF)

vs.

VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
RESPONDENT (DEFENDANT)

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Supreme Court of the United States:

Norfolk Southern Bus Corporation respectfully prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Fourth Circuit directing that court to certify to this court the record in the case of *Norfolk Southern Bus Corporation* v. *Virginia Dare Transportation Company, Incorporated,* No. 5227

in that court, in order that the decision and judgment of said court rendered on January 7, 1947, may be reviewed. (Copy of opinion is at the end of this petition.)

This petitioner is informed that Virginia Dare Transportation Company, Incorporated, has filed or is about to file its petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit in this case, accompanied by a transcript of the record from the court below. This petitioner will oppose the petition of Virginia Dare Transportation Company, Incorporated on the ground that this case does not deserve review by this court, and does not ask that this petition be granted if the petition of Virginia Dare Transportation Company, Incorporated is denied.

The record being filed by Virginia Dare Transportation Co., Inc., we hereby refer to same without needlessly furnishing another copy.

STATEMENT OF THE MATTER INVOLVED

This action was brought by Norfolk Southern Bus Corporation (hereinafter for brevity called Norfolk Southern) in the Circuit Court of the City of Norfolk, Virginia, against Virginia Dare Transportation Company, Inc. (hereinafter for brevity called Virginia Dare) in December, 1944, being an action of assumpsit claiming $30,000 damages for services rendered by Norfolk Southern to Virginia Dare for pickup, delivery and terminal service in Norfolk, Virginia, and Elizabeth City, North Carolina, from October, 1940,

to December 31, 1944, being based on a *quantum meruit* for services actually rendered.

Virginia Dare removed the case to the United States District Court for the Eastern District of Virginia at Norfolk, on the ground of diverse citizenship, Virginia Dare being a North Carolina corporation, and Norfolk Southern being a Virginia corporation.

In the District Court Virginia Dare filed an answer denying liability, and making a counter-claim for $91,000.00, alleging Norfolk Southern had broken a contract with Virginia Dare dated June 6, 1940.

In January, 1946, a trial was partly had, but a mistrial declared because of the sickness of a juror.

On June 17, 1946, trial before a jury again began, and ended on June 22, 1946, the Court directing a verdict in favor of Virginia Dare on the original claim, and the jury rendering a verdict for $60,000.00 in favor of Virginia Dare against Norfolk Southern on the counter-claim, which verdict the Court refused to disturb, and judgment was rendered accordingly on July 3, 1946, and thereafter appeal duly perfected by Norfolk Southern.

The action brought by Norfolk Southern was assumpsit for services undoubtedly rendered and the theory of the action was that the law raised and compelled an implied promise by Virginia Dare to pay for the services and that public policy and Federal Law would not permit Virginia Dare to escape payment for the services received at a reasonable figure on a *quantum meruit*.

Virginia Dare, in its answer by way of denial and counter-claim, took the position that it had a valid

written contract with Norfolk Southern dated June 6, 1940, by which Norfolk Southern was to render the pickup and delivery and terminal service for Virginia Dare without any charge if Virginia Dare would not run more than two round trips between Norfolk and Elizabeth City each week, and that Virginia Dare had not run more than such trips, and so owed Norfolk Southern nothing; and that this contract went into force for five years thirty days after its date, so the first five years had not expired when Norfolk Southern refused further service at the end of December, 1944, so damages were due Virginia Dare for about 6 months refusal to serve under the original five years of said written contract, and damages were also due for an additional five years as a right to renew for five years was claimed, although renewal for five years was very indefinitely, if at all, pleaded by the answer and counter-claim.

Norfolk Southern answered the counter-claim, denying authority of its general manager, who had signed said written contract, to make such a contract, and averring that regardless of authority, such supposed contract was contrary to Federal Law and public policy, was plainly to stifle competition in interstate commerce, and was invalid and unenforceable.

The District Court ruled as a matter of law that the contract was valid and enforceable if authorized or ratified, directed a verdict for Virginia Dare on the original claim against it; left to the jury on the counter-claim, only the question of whether or not the contract was authorized or ratified by Norfolk Southern, the amount of damages on the counter-claim, and

whether Virginia Dare had demanded a 5-year renewal; and held that Virginia Dare had the right, by its sole act to renew the contract for five years.

The Circuit Court of Appeals for the Fourth Circuit, by its opinion and order of January 7, 1947, correctly held that the contract was null and void, and illegal, and so Virginia Dare could take nothing on its counterclaim; but also held that the parties were in *pari delicto,* and so Norfolk Southern could have no recovery on its *quantum meruit* for the pickup delivery and terminal services actually performed for Virginia Dare in interstate commerce.

FACTS

Stripped of useless details, the facts are: Virginia Dare was a carrier of freight by motor truck in interstate commerce with a franchise between Norfolk, Va., and Elizabeth City, N. C. (via Sligo, N. C.), and from Elizabeth City, N. C., on to Manteo, N. C., and also between Norfolk, Va. (via Sligo, N. C.), and Manteo, N. C. (without touching Elizabeth City).

Norfolk Southern procured a franchise to carry freight by motor truck between Norfolk, Va. and Elizabeth City, N. C., via Sligo, and was to start operating in competition with Virginia Dare between Norfolk and Elizabeth City shortly after June, 1940, actually beginning in October, 1940.

Before June, 1940, Virginia Dare had for sometime rented terminals at Norfolk and Elizabeth City, and did its own pickup and delivery at those places, or

arranged for it there; and was running one or more round trips *every day*, except Sunday, between Norfolk and Elizabeth City.

With this competition between the two carriers about to commence, the contract dated June 6, 1940, was signed. The legal department of Norfolk Southern, who usually drew all contracts, did not draw this contract, nor see it for several years. It was apparently drawn by Mr. Wickersham, General Manager of Norfolk Southern, and signed by him for Norfolk Southern, and a counterpart thereof was found in his files several years later, after he had become ill, but the counterpart in his files was dated "this ..... day of May, 1940."

The contract of June 6, 1940, having been made, Norfolk Southern got its franchise between Norfolk and Elizabeth City, and began operating trucks daily (except Sunday) between those points, and Virginia Dare, which had been operating daily (except Sunday) between those points discontinued service between those points except two round trips a week, one on Tuesday and one on Thursday, operating into Norfolk Southern terminals, and Norfolk Southern rendering, free of charge, all terminal and pickup and delivery services for Virginia Dare at Norfolk and Elizabeth City for all freight of Virginia Dare, even when its freight moved between Norfolk and Manteo direct, without touching Elizabeth City. Thus, all competition of these companies between Norfolk and Elizabeth City was prevented except on Tuesdays and Thursdays (which were left nominally for competition) and the public was deprived of service of Virginia Dare be-

tween those points except one round trip on Tuesdays and Thursdays.

The companies operated under this contract till the fall of 1944, when the legal department of Norfolk Southern decided it was illegal, and Norfolk Southern refused to continue its service after December 31, 1944, and sued for the services it had rendered, on a *quantum meruit.*

The contract in question between these two competing carriers, was never submitted to the Interstate Commerce Commission, but made by these carriers, and what was done under it was done by them on their own authority alone.

Supplementary Contract

Whereas:

(1) Virginia Dare Transportation Company operates common carrier (freight) Manteo to Elizabeth City and Elizabeth City to Norfolk and Manteo to Norfolk with terminals, facilities and service at Manteo, Elizabeth City and Norfolk;

(2) Norfolk Southern Bus Corporation has a contract with Virginia-Carolina for purchase operating rights (freight) Norfolk-New Bern via Elizabeth City, Edenton, Plymouth and upon approval by I.C.C. and Utilities Commission of North Carolina expects to operate (freight) service between Norfolk-New Bern via Elizabeth City, Edenton and Plymouth;

(3) The above mentioned companies have determined that friendly relations and mutual assistance in the efforts of these two companies to develop the territory, better serve the public, and provide necessary facilities for handling, are in the public interest, and will conduce financial stability and efficiency in operation and public service;

(4) There are possibilities for improvement in schedules and service by suitable re-arrangement of same, employment of common user facilities instead of useless duplication;

(5) Through rates will enable the shipper to transmit freight from the territory of one company to that of the other without needless transfer and at acceptable rates;

THEREFORE:

(1) It is understood in the interests of both of these companies that they will consult from time to time on matters of mutual interest and will seek to develop and apply such policies of cooperation and coordination as will represent the interests of both, and outline and propose such policies as will be to their mutual benefit and acceptance and which shall be compatible with regulatory policies and statutes enacted;

(2) They will publish and file joint rates for approval by the I.C.C. and Utilities Commission of North Carolina covering the shipments of commodities generally between points Elizabeth City and Manteo via Virginia Dare Transportation Company and points between

Norfolk and Elizabeth City via Norfolk Southern Bus Corporation and Manteo and Norfolk; and revenue from same shall be divided between the two companies as follows:

Points: Manteo-Norfolk and vice versa. Hauled by: Va. Dare. Revenue: Va. Dare. All.

Points: Norfolk-Manteo via E. City and vice versa. Hauled by: N. S. & Va. Dare. Revenue: Va. Dare, 65%; N. S., 35%.

Points: Norfolk-E. City and vice versa. Hauled by: Va. Dare. Revenue: Va. Dare. All.

Points: Norfolk-E. City and vice versa. Hauled by: Norfolk Southern. Revenue: Norfolk Southern. All.

It is understood that all published rates and divisions thereof are to be subject to such orders and requirements as shall be from time to time ordered by the I.C.C. or the State Commissions regulating such matters; and shall be in accordance with Federal and State statutes; and nothing herein contained shall be required of these companies or either one of them which is disapproved by such regulatory bodies;

(3) Norfolk Southern Bus Corporation will establish and operate a freight terminal at Norfolk with pickup and delivery service and will permit Virginia Dare Transportation Company the use of same on a joint user basis—it being understood, however, that so long as Virginia Dare Transportation Company operates two or less round trips per week between Norfolk and Elizabeth City, no charge will be made for common user or terminal service including pickup and delivery. In the event schedules exceed this, then

the tonnage so handled on additional trips will be allocated at the same unit costs as apply to Norfolk Southern Bus Corporation in the handling of its own business; it being understood that in the event the control of Virginia Dare Transportation Company shall be changed to other parties, then this agreement shall be null and void;

(4) Norfolk Southern Bus Corporation shall establish and operate a freight terminal at Elizabeth City and will permit Virginia Dare Transportation Company to use same on a *common user basis.* So long as Virginia Dare Transportation Company operates two round trips or less from Elizabeth City to Norfolk, no charge shall be made for this including pickup and delivery except that on business from Elizabeth City to Manteo, Virginia Dare will with its lay-over trucks make such pickup and when Norfolk Southern trucks do this at times when Virginia Dare trucks are not available, Virginia Dare will perform for Norfolk Southern Bus Corporation an equal service, based upon 100 lbs., when they are not in use in Elizabeth City.

The arrangements herein outlined in (3) and (4) may be discontinued on thirty (30) days written notice from Virginia Dare Transportation Company in which event the two companies will endeavor to arrive at a working plan satisfactory to both. No terminal charges shall be allocated to either company taking into consideration through tonnage on through trucks which do not receive or deliver said tonnage at Elizabeth City;

(5) At both terminals, service shall be performed in an efficient and prompt manner. In the event of

failure of either party to this contract to operate according to the purposes and intents set out in this contract, the company so affected will notify the other company of said failure or violation in writing and will request proper correction of same; and upon receipt of same, the company so operating or handling will without delay correct said condition that the purpose and intent of this arrangement be complied with.

This agreement shall be for a period of five years and both companies shall have the right to renew same for an additional five years if they so desire.

(6) The Virginia Dare Transportation Company and Norfolk Southern Bus Corporation will stagger schedules in such manner as to avoid duplication of departures at Elizabeth City and Norfolk contingent upon requirements of their territories and services;

(7) Each company will rent to the other truck equipment on the basis of twenty (20c) per mile, the charges to be reciprocal for similar classes of trucks, such rentals to be made where trucks are idle or available at Elizabeth City or Norfolk;

Insofar as same may be approved by the I.C.C. or Utilities Commission of North Carolina, trucks of either company operating between Elizabeth City and Norfolk may handle freight for the other company on such basis as may be agreed upon;

(8) Such matters of common interest as may develop from time to time will be considered and representatives of the two companies will consider and work for the expansion and protection of the business and in-

terests of the companies where it shall appear they have a common interest.

(9) The foregoing contract shall become effective within thirty (30) days after signing.

IN WITNESS WHEREOF, * * * * * etc.

BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW

We maintain that this court has jurisdiction on *certiorari*, because the Circuit Court of Appeals, in refusing recovery for Norfolk Southern on its *quantum meruit* for services actually rendered in interstate commerce, has decided an important question of federal law erroneously; that this decision is of great importance, and is contrary to public policy and proper handling of interstate commerce.

And that there are special and important reasons for the highest court to decide this question, pursuant to Rule 38, Section 5, and the Act of February 13, 1925, as amended; 28 U.S.C. Section 347(a); Judicial Code, Section 240(a).

1. The Circuit Court of Appeals in holding that "The parties are in *pari delicto* and neither may recover" has overlooked the doctrine of a long line of cases decided by this court of which *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467, is typical, to the effect that for every transportation service rendered by an interstate common carrier reasonable and appropriate compensation is not only im-

plied, but is also imposed as a duty which can be discharged only by payment. The aforesaid holding of the said Circuit Court of Appeals constitutes a decision of an important question of federal law in conflict with applicable decisions of this court and of the appellate courts of other circuits.

2. The holding of the court below permits Virginia Dare to escape by illegality what the law obliges it to pay.

3. The Transportation Policy of the United States, being to foster and support the transportation systems of the country, to see that they receive adequate compensation for services rendered, to insure uniformity without discrimination and to require all persons receiving benefits from carriers to pay for them alike; is violated by the aforesaid holding of the Circuit Court of Appeals, which erroneously grants immunity by reason of illegality.

4. The aforesaid holding of the Circuit Court of Appeals not only denies recovery to the plaintiff, which is held to be in *pari delicto*, but also does violence to the governmental policy of fostering and promoting the solvency of carriers by forbidding them to give free services.

5. And said holding is substantially in conflict with *Steele* v. *General Mills, Inc.*, decided by this Court January 6, 1947.

THE QUESTION PRESENTED

Is whether or not the Norfolk Southern is barred by the doctrine of *pari delicto* from recovering on *quantum meruit* for its services actually rendered Virginia Dare, because of the illegal contract between them; to-wit:

A. Whether defendant Virginia Dare Transportation Company, after receiving from Norfolk Southern Bus Corporation, both being common carriers in interstate commerce, terminal and pick-up and delivery service at the expense of Norfolk Southern can claim immunity from payment therefor by reason of an illegal agreement that such services should be furnished free of charge.

B. Whether the transportation policy of the United States, as set forth in the Interstate Commerce Act, Transportation Act (U. S. Code Title 49) and other pertinent statutes, so imposes on one common carrier by motor vehicle the obligation to pay another and competing motor carrier for terminal and pick-up and delivery services, as to forbid that the carrier receiving such service shall escape the obligation by reason of an illegal contract that no charge should be made.

C. Whether the doctrine of in *pari delicto* applies in a case wherein two interstate common carriers illegally contract that one shall furnish without charge a service for which the transportation policy of the United States imposes a charge.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons for granting the writ are that the Circuit Court of Appeals has erroneously decided an important question of federal law as to interstate commerce.

The error assigned is that the Circuit Court of Appeals held that Norfolk Southern was not entitled to recover for the pickup, delivery and terminal services actually rendered, because that court held that the rule of *pari delicto* barred Norfolk Southern, and that Virginia Dare did not expect to pay for the services because of the illegal contract.

We submit that the duty of Virginia Dare to pay for the services actually rendered in interstate commerce was absolute and fixed by law, regardless of the desires of either party.

If this were not true, Virginia Dare would get the advantage of an illegal contract contrary to federal law, and have services in interstate commerce rendered free.

We submit that the rule of *pari delicto* does not release Virginia Dare from a *quantum meruit* when public policy under federal law requires payment.

This is similar in principle to the case of *Steele* v. *General Mills, Incorporated*, decided by this court January 6, 1947, which held that a contract carrier which had agreed with the shipper for a rate less than legal is not barred, either by the doctrine of *pari delicto*, or by estoppel, from recovering the full legal rate.

The public policy of the United States with respect to transportation has been declared in the Preamble of the Transportation Act of September 18, 1940, C. 722, Title I, Section 1, 54 Stat. 899, (49 U.S.C., page 4281) in part in the following language:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * * to encourage the establishment and maintenance of reasonable charges for transportation service * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of commerce," etc.

This and other parts of the Interstate Commerce Act clearly indicate a purpose on the part of Congress to assure to all carriers a fair return for their services, not for their individual benefit, but for the good of the country as a whole.

Virginia Dare Transportation Company, Incorporated, the defendant in the court below, has heretofore filed, or is about to file, a petition for writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered in this case, which petition will be opposed by this plain-

tiff. The petitioner (plaintiff) herein, Norfolk Southern Bus Corporation, while feeling aggrieved in the particulars above specified by the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, is presenting this petition only for the purpose of urging the errors above enumerated in the event that the petition of the said Virginia Dare Transportation Company, Incorporated is granted. If the petition of Virginia Dare Transportation Company, Incorporated is denied, this petition may likewise be denied, but if the petition of Virginia Dare Transportation Company, Incorporated is granted, this one should also be granted, in order that the whole case may be considered.

Respectfully submitted,

NORFOLK SOUTHERN BUS CORPORATION,

By S. BURNELL BRAGG,
Union Station, Norfolk, Va.

ARTHUR J. WINDER,
Union Station, Norfolk, Va.

JAMES G. MARTIN,
Western Union Bldg., Norfolk, Va.

J. KENYON WILSON,
Carolina Bldg., Elizabeth City, N. C.

Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 5527.

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

versus

VIRGINIA DARE TRANSPORTATION COMPANY,
INCORPORATED,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

(Argued November 15, 1946.
Decided January 7, 1947.)

Before SOPER and DOBIE, Circuit Judges, and CHESNUT, District Judge.

James G. Martin and J. Kenyon Wilson (S. Burnell Bragg and Arthur J. Winder on brief) for Appellant, and W. R. Ashburn and J. C. B. Ehringhaus (Ehringhaus & Ehringhaus on brief) for Appellee.

SOPER, Circuit Judge:

Two bus companies entered into a contract which gave rise to a claim and a counterclaim that form the subjects of this appeal. The validity of the contract is the prime feature of the controversy since the plaintiff corporation contends that the contract is invalid and brings suit for services rendered on the basis of a *quantum meruit*, while the defendant asserts the validity of the contract and files a counterclaim for its breach.

Prior to the execution of the contract, Virginia Dare Transportation Company was a carrier of freight by motor truck, operating under a franchise from the Interstate Commerce Commission between Norfolk, Virginia, and Elizabeth City, North Carolina, via Sligo, North Carolina, and thence to Manteo, North Carolina, and also between Norfolk and Manteo, without touching Elizabeth City. Some months before the inception of the contract Norfolk Southern Bus Corporation had entered into a contract, ultimately approved by the Interstate Commerce Commission, for the purchase of a franchise to carry freight by motor truck between various points in Virginia and North Carolina, including Norfolk and Elizabeth City, via Sligo, and was about to start operations. The contract was

executed on June 6, 1940, to become effective thirty days from that date. It recited the ownership of the similar franchises by the two companies and declared that they had determined that friendly relations and mutual assistance in the development of the territory and service of the public would conduce to the financial stability and efficiency of the companies, and would serve the public interest. Therefore, it was agreed that they would consult together and seek to develop policies of cooperation compatible with regulatory statutes and that they would publish and file joint rates for the approval of the Interstate Commerce Commission and the state commissions regulating such matters. Specifically it was agreed that Norfolk Southern would establish and operate freight terminals at Norfolk and Elizabeth City, with pickup and delivery service, and would permit Virginia Dare to use them on a joint user basis, and that so long as Virginia Dare should operate no more than two round trips a week between these terminals, no charge would be made for the facilities and services furnished; but if Virginia Dare should operate more frequently, the tonnage handled on the additional trips would be allocated at the same unit costs as applied to Norfolk Southern in handling its own business. The agreement was made for a period of five years beginning July 6, 1940, and provided that both companies should have the right to renew it for an additional period of five years.

Prior to the contract period, Virginia Dare had rented terminals at Norfolk and Elizabeth City, had performed or arranged for its own pickup and delivery service at those places, and was running one or more

round trips every day except Sunday. After July 6, 1940, Virginia Dare ran only two round trips each week on Tuesdays and Thursdays, and Norfolk Southern rendered all terminal and pickup and delivery services for Virginia Dare without charge. So the situation remained until the fall of 1944 when Norfolk Southern, upon the advice of counsel, declared the contract to be illegal, refused to continue further service to Virginia Dare after December 31, 1944, and brought suit for services rendered by it to Virginia Dare in the sum of $30,000. Virginia Dare defended the suit on the ground that the contract was valid and presented a counterclaim for breach of contract in the sum of $91,000. This sum it estimated to be its damages both for the remainder of the original five year period and for an additional five years for which it claimed that it was entitled to extend the contract under the renewal privilege.

Upon the trial the District Judge ruled that the contract was valid and directed the jury to render a verdict against Norfolk Southern on its claim, but left it to the jury to determine the damage to which Virginia Dare would be subjected by reason of the breach by Norfolk Southern during the period between January 1, 1945, and July 6, 1950. The jury found a verdict for Virginia Dare in the sum of $60,000.

The question as to the validity of the agreement turns to some extent upon its interpretation. Norfolk Southern contends that under the contract it agreed to furnish terminal facilities and pickup and delivery services to Virginia Dare at Norfolk and Elizabeth City without charge, if Virginia Dare would restrict

its operations between these points to two round trips per week. Virginia Dare conceded that it did actually confine its operations to two round trips per week during the four and a half years in which the arrangement existed, but contends that it did not surrender the right to make additional trips because the contract expressly provided that if its schedule exceeded two trips per week, it was to pay the costs of the tonnage handled on the additional trips. These conflicting contentions, arising from the language of the contract and the method of its performance during a substantial period of time, indicate that the contract is not free from ambiguity and that the District Judge was in error in refusing to receive in evidence certain letters and certain testimony which indicate quite clearly the understanding by the parties and the purposes for which the agreement was drawn up. This testimony, which was taken out of the presence of the jury and rejected, showed it to be the intention of the parties that Virginia Dare was to operate only two days a week instead of six days a week, as it had previously done, and that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business, and that the revenues were to be divided at the end of the month on a one-third—two-thirds basis.

This evidence was admissible, not only because it cleared up the ambiguity of the contract, but also because it indicated that the written instrument did not contain the entire agreement between the parties; and since the making of this contract and its performance were illegal acts, as we shall see, the court should not have applied the strict rule that extrinsic evidence

may not be received to vary the terms of a written agreement, but should have opened the way for the light that revealed the true intention of the transaction. See 1 Williston on Contracts (6th ed. 1937) §28A; 3 *id.* §627; 6 *id.* §1630A; Restatement, Contracts §600.

Virginia Dare seeks to avoid this conclusion by pointing out that the contract, as written, was susceptible of lawful performance and could have been lawfully performed for the rest of the first five-year period and all of the renewal period of five years, and that Virginia Dare is entitled to this performance and to damages for the breach, even though the methods actually employed during the preceding period were unlawful. But, we think that the interpretation given to the contract by the parties is the more reasonable and must control. It was not drawn by a lawyer and did not express as clearly as it might have done the obligation of Virginia Dare to abstain during two-thirds of the week; but its consistent and unbroken abstinence in this respect, the benefits it received thereby, and the division of the revenues on the agreed basis show all too clearly what the parties intended by the written document.

In effect, this interpretation and this performance restricted competition between the parties and reduced the transportation services and facilities available to the public in a manner which constituted in our opinion a violation of Section 1 of the Sherman Antitrust Act, 26 Stat. 209 (1890), 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1941), which provides that every contract in restraint of trade or commerce among the several states is illegal. The arrangement between the parties was

similar, except as to the extent of the monopoly, to that described in *Lee Line Steamers, Inc.* v. *Memphis, Helena & Rosedale Packet Co.*, 6 Cir., 277 F. 5, where two competing steamboat companies, each of which operated a steamer between two points on the Mississippi River, agreed to the division of the entire tonnage carried by the two lines, based on each steamer making two round trips each week, the earnings from the carriage of the tonnage to be settled for monthly on the basis of 50 per cent for each line. With respect to this agreement the court said: [page 9]

"* * * That a complete unification of river freight transportation between the points stated was contemplated and effected plainly appears by the terms of the contract, in connection with the concessions before referred to, including the provision for equal division of combined gross earnings, which effectually discouraged competition between the two lines with respect to furnishing facilities or bettering service—a monopoly made even the more certain by requiring the line failing to make its allotted number of trips to account to the other line on the basis of the average tonnage which it would have handled, and at the average price per ton which it would have received, if it had made the full number of scheduled trips. Plainly, the rights of the public were set entirely to one side, and it was left to the mercies of the combination."

We do not have a complete monopoly in the pending case because the parties here did not control the entire common carrier motor traffic between the terminals. There were four other motor carriers in the business, some of which later discontinued operations.

But an agreement in restraint of trade or competition in violation of the Act may occur even though a complete monopoly does not result. For example, it was said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, at 221, that any combination which tampers with price structures is engaged in an unlawful activity; and that, even though the members of the group are in no position to control the market, they directly interfere with the free play of market forces to the extent that they raise, lower or stabilize prices. *Cf. Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360, 374. The same rule is applicable to a combination whose result is substantially to restrict or cut down competition in the facilities and services previously offered by the parties to the public. *United States* v. *Eastern States Retail Lumber Dealers' Ass'n.*, S.D. N. Y., 201 F. 581, aff'd. 234 U.S. 600*; *United States* v. *St. Louis Terminal*, 224 U.S. 383, 236 U.S. 194. See *United States* v. *Great Lakes Towing Co.*, N.D. Ohio, 207 F. 733, 217 F. 656, appeal dismissed, 245 U.S. 675; *United States* v. *General Motors Corp.*, 7 Cir., 121 F. 2d 376, *certiorari* denied, 314 U.S. 618; *Johnson* v. *Schlitz Brewing Co.*, E.D. Tenn., 33 F. Supp. 176; *United States* v. *Swift & Co.*, D. Colo., 52 F. Supp. 476; *Monogehela Coal Co.* v. *Jutte*, 210 Pa. 288.

Moreover, the evidence in the instant case indicates that the combination of the parties was not without its effect upon the rates offered to the shippers by motor transportation. The rejected testimony included that

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*In this case the Supreme Court had no difficulty in concluding that the purpose of sending to the members of the retail dealers' association the names of wholesalers who sold at retail was to put the ban on such wholesalers, although there was no express agreement to that effect. See 234 U.S. at 608-609.

of the general freight agent of Norfolk Southern who testified that before the contract was entered into, Virginia Dare's first class rate was 32c and that in October, 1940, this rate was raised to 40c, in equality with the first class rate at which Norfolk Southern started business between the terminals. Furthermore, the rates of Norfolk Southern on certain articles were higher than those of Virginia Dare during the period of the performance of the contract so that one who shipped these articles by Virginia Dare on Tuesdays and Thursdays enjoyed a lower rate than if the shipments were made on other days of the week. The restriction of Virginia Dare to two days a week therefore tended to increase the cost of the transportation of these articles to the public.

Irrespective of the provisions of the Sherman Act, the contract between the parties lacked legal validity because it was in conflict with amendments to the Interstate Commerce Act. Chapter 8 of the Act was added on August 9, 1935, to bring the transportation of passengers or property in interstate commerce by motor carrier within the control of the Interstate Commerce Commission. See 49 U.S.C.A. App. §§ 301 *et seq.* (1945). Subsequently Section 5(1) of the statute was amended by the Act of September 18, 1940, so as to require the specific approval by the Commission of any contract between interstate motor carriers for the pooling or division of traffic or service. See 49 U.S.C.A. App. §5(1) (1945). It is obvious that the agreement between the parties was of the very kind at which the statute was directed, because the arrangement of the business, as shown by the correspondence between the

parties, contemplated that the traffic handled by them and the revenues derived therefrom should be divided monthly on the basis of one-third to Virginia Dare and two-thirds to Norfolk Southern.*

We have no difficulty in holding that it was unlawful for the parties hereto to enter into the contract except upon the specific approval by order of the Commission, and that their operation under the contract without securing such approval constituted an offense during each day of its continuance, 49 U.S.C.A. §10(1). See *Escanaba & Lake Superior R. R.* v. *United States,* 303 U.S. 315, 319; *In re Pooling Freights,* W.D. Tenn., 115 F. 588; Application of Texas & New Orleans R.R. Demurrage, 223 I.C.C. 437; Union Belt of Detroit Pooling of Revenues, 201 I.C.C. 577; Pooling of Passenger-Train Revenues and Services, 201 I.C.C. 699.

Nor is this conclusion affected by the fact that the agreement between the parties became operative before the amendment to the statute which subjected pooling agreements between motor carriers to the approval of the Interstate Commerce Commission. The declared will of Congress could not be thwarted by the continuance of the arrangement without the approval of the Commission after the amendment of the statute went into effect. See *Philadelphia, Baltimore & Washington R. R.* v. *Schubert,* 224 U.S. 603; *Louisville &*

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*We are not unmindful of the fact that agreements for the joint use of terminal facilities and for pickup and delivery service require no specific authorization from the Commission. Universal Cartage Co.—Purchase—Dixie Cartage Co., 37 M.C.C. 107, 110; Consolidated Freight Lines, Inc., Com. Car. Application, 11 M.C.C. 131, 136; but the agreement in suit also included a provision for the division of traffic and revenues therefrom.

Nashville R. R. v. *Mottley,* 219 U.S. 467. The agreement should have been submitted to the approval of the Commission after the amendment became effective, and since it was not, it fell within the interdiction of the statute and was therefore unlawful and void. See authorities collected in *Pittsburg Plate Glass Co.* v. *Jarrett,* M.D. Ga., 42 F. Supp. 723, 730, modified on other grounds, 5 Cir., 131 F. 2d 674; Restatement. Contracts §§ 457, 608; 6 Williston on Contracts (6 ed. 1938) §1759.

It follows, therefore, that Virginia Dare has no ground on which to base its counterclaim. The damages sued for are occasioned by the failure of Norfolk Southern to perform the very provisions of the contract which violate the relevant statutes; and there is no room for the doctrine, on which Virginia Dare in part relies, that contracts which are merely collateral to activities in violation of the Sherman Act may be enforced, and that legal portions of a contract which are severable from illegal sections thereof may be the subject of suit. For the same reasons the original suit of Norfolk Southern must fail; and in its case it may be added that until Norfolk Southern itself denounced the contract, Virginia Dare performed all the promises on its part, and that a contract to pay for services cannot be implied in the face of an express agreement that they shall be performed without charge if certain conditions are met. See *Municipal Waterworks Co.* v. *City of Ft. Smith,* W.D. Ark., 216 F. 431, 438; *Lueddecke* v. *Chevrolet Motor Co.,* 8 Cir., 70 F. 2d 345, 348; *Sickelco* v. *Union Pacific R.R.,* 9 Cir., 111 F. 2d 746, 750; *Jarka Corporation of Baltimore* v. *Pennsylvania*

R.R., D.Md., 42 F. Supp. 371, 376, aff'd., 4 Cir., 130 F. 2d 804, 806. *Cf. Baltimore & Ohio R.R.* v. *United States*, 261 U.S. 592, 598; *Ross Engineering Co.* v. *Pace*, 4 Cir., 153 F. 2d 35, 45; Restatement, Contracts §§ 514, 598; 5 Williston on Contracts (6th ed. 1937) §1630. The parties are *in pari delicto* and neither may recover.

The judgment of the District Court against Norfolk Southern on its original claim will be affirmed, and the judgment in favor of Virginia Dare on its counterclaim will be reversed and the case will be remanded to the District Court with instructions to enter a judgment against Virginia Dare on the counterclaim.

Affirmed in part, reversed in part, and remanded.

Supreme Court of the United States

OCTOBER TERM, 1946

NORFOLK SOUTHERN BUS CORPORATION,
(Appellant Below)

vs.

VIRGINIA DARE TRANSPORTATION COMPANY, INC.,
(Appellee Below)

No. 1218

REPLY BRIEF TO CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES:

Virginia Dare Transportation Company, Incorporated, Appellee Below, respondent herein and petitioner in No. 1217 respectfully replies to the cross-petition of Norfolk Southern Bus Corporation, Appellant Below, and respondent in No. 1217, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The cross-petition herein made reference to the transcript of record filed by the respondent herein as petitioner in No. 1217. References in this reply brief will therefore be made to the transcript of record filed in this Court in No. 1217 and for brevity and clarity, the petitioner in this cross-petition will hereinafter be referred to as "Norfolk Southern" and the respondent therein will be referred to as "Virginia Dare."

STATEMENT OF MATTER INVOLVED

To avoid unnecessary repetition, Virginia Dare hereby makes specific reference to what was said in its Petition for Writ of Certiorari in No. 1217 and particularly to the "Statement of the Matter Involved," beginning on page 1 of said petition and ending on page 6 thereof. However, attention is respectfully directed to page 4 of the cross-petition filed herein (No. 1218). There it is stated that "Norfolk Southern was to render the pick-up and delivery and terminal service for Virginia Dare without any charge if Virginia Dare would not run more than two round-trips between Norfolk and Elizabeth City each week." Attention is respectfully directed to the terms of the so-called supplementary contract (Defendant's Exhibit 2, pages 210-215 of the transcript of record) wherein it will be seen that the true import of the language of the supplementary contract was that Norfolk Southern agreed to furnish in part compensation for rights and properties surrendered, etc., terminal pick-up and delivery service to Virginia Dare at Norfolk and Elizabeth City without further charge for as many as two round-trips a week and that Virginia Dare was to pay a stipulated amount for such services for any additional trips, that is, trips in excess of two round-trips a week. This being considered one of the pivotal points of this case, it is right and proper that a correct appraisal of the contract terms should here and now be brought to the attention of the Court.

ARGUMENT IN REPLY TO CROSS-PETITION

Virginia Dare herewith reasserts its contention that this Court has jurisdiction to review the judgment here in question upon the grounds asserted in Virginia Dare's petition in No. 1217 (P. 6) and reemphasizes the reasons stated in Virginia Dare's Petition and in the Brief supporting said petition. However, it is respectfully suggested that the contention, asserted by Norfolk Southern in its cross-petition in

No. 1218 (P. 12 et seq.), that jurisdiction exists to review the judgment of the Circuit Court of Appeals upon the cross-petition of Norfolk Southern upon the grounds stated in the cross-petition (Pp. 12 & 13) is untenable.

Principally, in its cross-petition, Norfolk Southern asserts that the Circuit Court of Appeals, held that the parties were in *pari delicto* and that neither could recover, which amounted to a decision of an important question of Federal law in conflict with applicable decisions of this Court and with decisions of the Appellate Courts of other Circuits. But from the record herein and from Virginia Dare's petition in No. 1217, it will appear that Virginia Dare has repeatedly and consistently contended that there was no slightest semblance of illegality in any of the transactions which are the subject of this litigation, either by contract or by performance. Accordingly, since no illegality is attributable to Virginia Dare, it reasserts respectfully that the Circuit Court of Appeals did err in holding that such illegality (if any there were) attached to Virginia Dare, as well as to Norfolk Southern. However, still insisting there was no illegality on the part of Virginia Dare, it is apparent from a study of cases cited by Norfolk Southern in its cross-petition that such decisions are not apposite to the matters herein involved.

Norfolk Southern cites *Louisville and Nashville Railroad Company* v *Motley*, 219 U. S. 467, 55 L. Ed. 297. In that case, the Court had under consideration a contract made by an interstate carrier by which it agreed to issue an annual pass for life to the plaintiff and his wife in consideration of a release of a claim for damages for injuries received by the plaintiff and his wife in consequence of a collision of trains on the railroad of the defendant company. Action was brought on the contract by the plaintiff and his wife to require specific performance. The Court held that after the passage of the Commerce Act, the contract could not be

enforced against the railroad company, even though it was valid when made, for the Act prohibited charging, collecting or receiving anything but money for transportation on the defendant's railroad, and further prohibited it from demanding, collecting or receiving a greater or less different compensation for the transportation of persons or property or for any service in connection therewith than that specified *in its published schedule of rates.*

Norfolk Southern further cites *Steele* v *General Mills, Inc.*, 91 L. Ed. Adv. Sheet No. 5, page 315, decided January 6, 1947. In this case, the Court had under consideration a supplemental agreement by which a carrier agreed to transport goods for a shipper for less than the rate prescribed for common motor carriers. The carrier later brought suit to recover the full rate fixed by the general orders of the Railroad Commission of the State of Texas, prescribing common carrier rates. Mr. Justice Black, for the Court, concluded that the carrier was entitled to recover the full rate fixed by the Commission.

Both the *Motley* Case and the *Steele* Case are cases involving a situation where less than the prescribed rate or published schedule of rates was charged for the transportation service afforded the shipper or user of the transportation facilities. There is no slightest suggestion in either of these cases, nor in any other of which we are aware, that the same rule of law applies to the facts presented by the record in the case at bar.

Paragraphs 2, 3 and 4 on page 13 of Norfolk Southern's cross-petition indicate a reliance on the part of Norfolk Southern upon the so-called "Transportation Policy of the United States" in support of its position that it is entitled to recover from Virginia Dare on a *quantum meruit* basis and that Virginia Dare should not escape a payment for services rendered by Norfolk Southern simply because of illegality. It is asserted by Norfolk Southern that the transportation

policy requires that all persons receiving benefits from carriers should pay for them alike and further that said policy forbids carriers to give free services. In the first place, we are unable to see why any of the reasons set out in paragraphs 2, 3 and 4 are tenable as a basis for jurisdiction, inasmuch as Norfolk Southern has sought to give to the transportation policy of the United States a restriction which it does not assert, nor which was intended to be asserted in the enactment of the Transportation Act of September 18, 1940, C. 722, Title 1, Section 1, 54 Stat. 899 (49 U. S. C., 4281). In considering and construing the transportation policy as defined in the Preamble to the Transportation Act of September 18, 1940, this Court, through Mr. Justice Rutledge, has stated in *Miss. State Horticultural Company* v *Pennsylvania Railroad Company*, 30 U. S. 356, 88 L. Ed. 96, 101:

> "The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate non-discriminatory transportation at reasonable *rates*." (Emphasis supplied)

In this case and in *Pittsburg, CC & St. Louis RR. Co.* v *Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151, and in *Louisville and N. R. Company* v *Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (in both of which, the Court had under consideration the scope of the transportation policy of the United States) the Court manifestly construed the intention of Congress as evidenced by the Preamble to the Transportation Act of September 18, 1940, to be one designed to insure the uniformity of rates and charges and to protect shippers and the general public from discriminatory charges. Nowhere, either in the statute itself or in the language of the Courts construing the same can be found any

limitation upon the right of carriers as between themselves to contract for the rendition of services not affecting or resulting in discriminatory rates to shippers or deviation from public schedules of rates and charges.

A refusal to permit Norfolk Southern to recover on its claim on a *quantum meruit* basis can in nowise result in the granting to Virginia Dare of immunity by reason of illegality nor would such a result run counter to the express prohibition in the statute forbidding carriers to give free services. The real reason for rejecting Norfolk Southern's claim is set forth in the last two paragraphs of the Circuit Court's opinion. On the facts admitted no promise to pay for these can be implied since the services were admittedly both accepted and rendered without any expectation of compensation.

Throughout a consideration of this case, it must be borne in mind:

1. That the papers which are the subject of this litigation were drawn by Norfolk Southern officials and were sent to Virginia Dare for signature (Transcript pp. 42-43, 52-53).

2. For such terminal, pick-up and delivery services as were afforded Virginia Dare, Norfolk Southern received full and adequate compensation as set out in the contracts in question; namely, the Habit Franchise (between Norfolk and Elizabeth City, which it still possesses and enjoys), the terminals which Virginia Dare had been using up to the time of the contract, and release from its (Norfolk Southern's) obligations under a previous contract. Except for the almost nominal cash paid by Norfolk Southern, the principal value to Virginia Dare was the arrangement for terminal pick-up and delivery services at Norfolk and Elizabeth City, which was largely prospective and covered a period of years ahead.

Even if illegality appeared, which is certainly not conceded by Virginia Dare, upon these facts there is neither "an escape" of a legal obligation to pay, nor an "immunity", nor did Virginia Dare receive "free services."

Since the cross-petition of Norfolk Southern accepts the holding of the Circuit Court as to the illegality of the contract arrangement but rejects the holding of the Court insofar as it applies the doctrine of *in pari delicto*, argument in this reply brief to the cross-petition has been confined to that question alone. Again it is respectfully suggested that the positions taken by Virginia Dare in this reply brief should not be construed to indicate any recession from or in contradiction of the assertions and contentions set out in Virginia Dare's petition for Writ of Certiorari and Brief in Support of Petition in No. 1217.

Respectfully,

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